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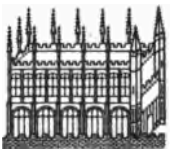

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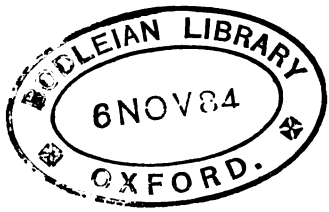

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HISTORY OF THE LAW AFFECTING MARRIED WOMEN.

CHAPTER I.

UNITY OF HUSBAND AND WIFE.

"*Eadem caro vir et uxor*" (*a*) is the leading principle of the English common law applicable to the property of married women; the principle probably had its origin in the introduction of the feudal system into England.

By marriage the husband and wife became one person in the eyes of the common law; still, no new "*persona*" was created, the "*persona*" of the wife was considered as completely merged in that of the husband, nearly all her property became his *ipso facto*, and his domicile became hers (*b*); and yet, in the face of this, Blackstone remarks that the female sex is the special favourite of the English law.

In Anglo-Saxon times it would appear that a married woman had a certain individuality, and had the power of disposition over certainly a large part, if not the whole, of her property. An Anglo-Saxon wife could possibly dispose of the property settled on her by her husband as the consideration for the marriage, and she could certainly dispose of her *morgengifu*, that is, the gift presented to the wife by the husband on the first morning after the consummation of the marriage. There was no limit as to the amount of the

(*a*) Bracton, fo. 32.
(*b*) *Warrender* v. *Warrender*, 2 Cla. & Fin. 488.

morgengifu, it being at the discretion of the husband to give whatever he wished.

The Norman principle of the subjugation of the wife came, no doubt, from the Germanic doctrine of the "*mund*," which was common to all the Germanic races, and which placed the wife in the hand (*mund*) of the husband. As these Germanic tribes moved westwards, they were brought into contact with the civilizing influences of the west. In the south of France the contact with the Roman law gradually turned the *mund* into a guardianship, and in England the efforts of the clergy finally succeeded in obtaining for the Anglo-Saxon wife the individuality before referred to. But the Normans, the descendants of Rollo and his Northmen, kept their old characteristics, and their manners and customs were different from those of the inhabitants of the remainder of France. The reason is obvious. Rollo and his Northmen conquered Normandy many years after the Franks were firmly established in France. They came fresh from their native country, and brought with them their native laws.

The determination of such matters of early history is surrounded with difficulty, and the various steps in the development of this doctrine of unity can only be surmised. But this is certain, that in Anglo-Saxon times a married woman had a legal individuality, and undoubtedly had a limited, if not an unlimited, power of disposition over her property, whereas, by the time of Glanvil she had become the mere creature of her husband's will; her property became his, and her personality was merged in his. Glanvil says:—"*Cum mulier ipsa plene in potestate viri sui de jure sit, non est mirũ si tam dos quam ipsa mulier et cetere omnes res ipsius mulieris plene intelliguntur esse in dispositione viri ipsius*" (*c*). Whether this doctrine of unity was brought over by the Normans at the time of the Conquest, and imposed upon the conquered Saxons, or whether it was developed after the Conquest, it is impossible to say. All that is known with any certainty is, that it existed in England and Normandy, and nowhere else.

(*c*) Glanvil, vi. 3.

The idea of the principle is clearly feudal: it was the man who fought, it was the man who attended the council chamber, it was the man who had the physical force, and therefore it was the man who had the property.

The doctrine that husband and wife are one person in the law has been frequently cited as a complete summary of the law applicable to the property of married women. Mr. Justice Lush, however, in the case of *Phillips* v. *Barnett* (*d*), said:—"It is a well-established maxim of the law that husband and wife are one person. For many purposes this is a mere figure of speech; for other purposes it must be understood in its literal sense." How far the feudal principle of unity has been carried out will appear hereafter.

(*d*) L. R., 1 Q. B. D. 440.

CHAPTER II.

CHOSES IN POSSESSION.

In Saxon times the law applicable to moveables and immoveables was alike, and in Norman times personalty was of so little importance that the law took hardly any notice of it. In mediæval days, even in the case of a rich woman, the law regarded her personalty as so trivial that it was unnecessary to impose any limitation on the husband's ownership. In fact, so little was the value of personalty, that if a person committed accidental homicide the forfeiture of his personalty was a penalty of which no one complained. It is, therefore, not surprising to find that the principle of the unity of husband and wife has been rigidly applied to the wife's personal chattels in possession.

The rule of common law is that the chattels personal in possession, and the specific chattels in the hands of third persons, which belonged to the husband before the marriage, continue to belong to him absolutely after the marriage, and that the chattels personal or moveable goods belonging to the wife at the time of her marriage, or given to her afterwards, become the absolute property of her husband in the same manner precisely as if they had been originally his own, or had been subsequently given to him (*a*). They may be disposed of by the husband during his lifetime, or by his will; they are subject to his debts; and if he should die intestate his widow will only take the same share of them as she is entitled to in his other personalty. So strictly has this rule been applied, that where chattels personal were given to a married woman jointly with a third person, it was held, that the husband took his wife's share, that the jointure was

(*a*) Co. Litt. 300 a, 351 b; 1 Rop. Husb. & Wife, 169.

severed as regards the married woman, and that the husband and the third party become tenants in common (*b*).

The term "personal chattels" includes all moveables, such as household goods, jewels and cash in hand. It was at one time doubtful whether it included cash at a banker's, but Sir William Grant decided, in 1811 (*c*), that a balance at a banker's was a debt, and not a deposit; and the House of Lords, in the case of *Hill* v. *Foley* (*d*), held, that the relation between banker and depositor was that of debtor and creditor, and that cash at a banker's was merely money lent. Cash at a bank, therefore, is a chose in action, and not a chattel in possession. Sir William Grant, however, remarked, that if the money had been handed over to the banker in a sealed bag, it would be a *depositum*, that is to say, it would be a specific chattel, and as such would pass to the husband on marriage. The marriage also gave the husband the exclusive property of his wife's personal chattels in the hands of third parties: he might in his own name alone bring detinue, replevin or trover for them; and even if he died without having recovered them, they went to his representatives, and not to his wife by survivorship. "*Si femme perd biens, et prit baron, et baron mort, l'executor del baron aver ceux biens, quia le property de eux est en luy per le marriage, nient obstant le perder*" (*e*). The wife's personal chattels in the hands of third persons must not be confounded with the wife's choses in action. Choses in action will be treated later on.

Such, then, was the state of the common law relating to the wife's choses in possession, and it continued in its original simplicity down to 1857, when it was enacted by the Divorce Act of that year (*f*), that a married woman who had obtained a protection order, or a judicial separation, should have the same powers of disposition over property of every description which she might thereafter become entitled to, as if she were

(*b*) *Bracebridge* v. *Cook*, Plowden, 411; *Re Barton's Will*, 10 Hare, 12.

(*c*) *Carr* v. *Carr*, 1 Merivale, 543, n.

(*d*) 2 H. L. 28.

(*e*) *Powes and uxor* v. *Marshall*, 1 Siderfin, 172.

(*f*) 21 & 22 Vict. c. 85, ss. 21 and 26.

a *feme sole*, and the husband's rights therein were completely taken away, even in the case of her intestacy. Subject, then, to the provisions of this Act, a married woman could not have any interest in chattels in possession during the coverture, unless they were settled on her for her separate use. The subject of separate estate will be treated later on.

In the year 1870, the Legislature for the first time recognized the equitable doctrine of separate use; the Married Women's Property Act of 1870 (*g*) considerably curtailed the husband's marital power over his wife's choses in possession.

It may be remarked in passing, that the bill as originally introduced, and as it passed the House of Commons, attempted to do away altogether with the theory of conjugal unity of property. It provided, that "a married woman shall be capable of holding, acquiring, alienating, devising and bequeathing, real and personal estate, of contracting and of suing and being sued, as if she were a *feme sole*,"—a clause very similar to the provisions of the Married Women's Property Act of 1882—however, it was rejected in the House of Lords.

By the 1st section of the Act of 1870, the earnings of a married woman acquired or gained by her after the passing of the Act, are to be deemed to be settled to her separate use independent of her husband. Previously the earnings of a married woman belonged to her husband, and where a husband brought an action to obtain payment of his wife's earnings, it was held that it was no good defence to plead that the payment had already been made to the wife, who had not been authorized by the husband to receive them (*h*).

The earnings of the married woman in order to come under the protection of the Act must be gained by her in an employment, occupation or trade, in which she is engaged, or which she carries on separately from her husband, and the determination of what is a separate employment, occupation or trade, is sometimes difficult. Where a woman had carried on a business before marriage, and after marriage the busi-

(*g*) 33 & 34 Vict. c. 93. (*h*) *Offley* v. *Clay*, 2 Man. & Gr. 172.

ness was continued in her maiden name, but the husband resided on the premises, on the death of the husband it was held by the Court of Appeal, affirming the decision of Sir Richard Malins, V.-C., that the stock-in-trade and capital of the business belonged to the widow, and were not part of the husband's estate (*i*). In a later case a butcher, in consequence of confirmed intemperance, became incapable of continuing his business, and was removed to the workhouse infirmary suffering from *delirium tremens*. The wife continued the business, and the husband on leaving the infirmary returned to, and resided at, the place of business, but did not interfere in its management. Meat, which had been purchased by the wife, was seized in execution for a debt of the husband, and it was held that the case disclosed such a separate trading by the wife as to warrant the Court in holding that the goods seized were the property of the wife.

By the 2nd section of the Act it was provided that deposits in post-office and other savings banks, and annuities granted by the National Debt Commissioners made to or granted in the name of a married woman or woman who should thereafter marry, should be deemed, if made or granted after the Act, her separate property. It had been enacted in 1863 (*k*), that it should be lawful for the trustees and managers of any savings bank to pay any sum of money in respect of any deposit already made, or to be made, by married women, or by women who should marry after such deposit, to any such woman, unless the husband of such woman should give to such trustees or managers notice in writing of his marriage with such woman, and should require payment to be made to him; and under this statute a husband could always claim an annuity, or draw any deposit standing in his wife's name. The before-mentioned provision of the Act of 1870 materially checked this power of the husband, for whereas previous to the Act he had only to give notice of the marriage and the whole of the wife's fund

(*i*) *Ashworth* v. *Outram*, 5 C. D. 923.
(*k*) 26 & 27 Vict. c. 87, s. 31.

thereupon became his, after the Act the wife still continued the owner of the fund, provided that it was not the produce of money belonging to the husband and obtained without his consent.

By the 3rd section of the Act of 1870, the authorities of the banks of England and Ireland were required, on the application of a married woman or woman about to be married, to register as her separate property, and to transfer to her the investments in the same, to which she was entitled, and which she was about to acquire, and to pay to her, as if she were a *feme sole*, the dividends and profits thereon; but these provisions did not apply unless the investment was of the amount of 20*l.* at least. By the Metropolitan Board of Works Act, 1871 (*l*), this section of the Act of 1870 was extended to Metropolitan Consolidated Stock. The 3rd section of the Act of 1870 only applied where the married woman held beneficially and not as a trustee (*m*). The presumption that a married woman is beneficially entitled to money standing in her name may be rebutted by showing that she holds as trustee, executrix or administratrix, or as agent for her husband or for a third person. Thus, where a wife being executrix of her father paid money she received as such into a bank to an account in her own name as such, and her husband paid money of his own to this account, and the wife having drawn cheques upon the account for payment of debts due by the husband and for payment of household expenses, on the death of the husband it was held by the Court of Appeal, reversing the decision of Sir Richard Malins, V.-C., that the wife was merely the agent of the husband, and that the money remaining in the bank belonged to his estate and not to the wife's (*n*). In the *Hercules Insurance Company, Pugh and Sharman's case* (*o*), S., who was a large shareholder in a company, wished to take more shares, but the directors refused to allow his name to appear for any

(*l*) 34 & 35 Vict. c. 47, s. 14.

(*m*) *Howard* v. *Bank of England*, L. R., 19 Eq. 295.

(*n*) *Lloyd* v. *Pughe*, L. R., 8 Ch. 241.

(*o*) L. R., 13 Eq. 566.

larger number. He then, at the suggestion of the secretary and with the concurrence of a local agent of the company, sent in an application for shares signed by his daughter P., a married woman residing elsewhere but then on a visit to him. Her condition was not stated in the application, and the father's residence was given. The deposits on application and allotment were paid by S., and he received the notice of allotment and a dividend which was paid, and all the notices relating to the company which were posted to P. at his address. P. signed the application without being informed or knowing what it was, and never told her husband anything about it, and neither of them knew she was on the list till an application was made by the official liquidator; and it was held by Sir Richard Malins, V.-C., in 1872, that the case was similar to that of an application for shares in the name of a fictitious person, and that the name of S. must be substituted for P. in the list of contributories.

By sects. 4 and 5 of the Act of 1870, incorporated and joint stock companies, and friendly societies, were also required, on the application of a married woman or woman about to be married, to register as her separate property, and to transfer to her the investments in the same to which she was entitled. The law as to friendly societies was amended and consolidated by the Friendly Societies Act, 1875 (*p*).

On the application by a married woman to a joint stock or incorporated company to register stock in her name as "a married woman entitled to her separate use," the company was bound to investigate her title, and, if they refused to register, the Court, unless a flaw in the title were shown, would compel them, by mandamus, to register (*q*).

A most important alteration of the old law was made by the 7th section of the Act of 1870, which enacted that where any woman married after the passing of that Act should, during her marriage, become entitled to any personal property as next of kin, or one of the next of kin, of an intestate,

(*p*) 38 & 39 Vict. c. 60.

(*q*) *The Queen* v. *Carnatic Railway Company*, L. R., 8 Q. B. 299.

or to any sum of money not exceeding 200*l.* under any deed or will, such property should, subject to the trusts of any settlement affecting the same, belong to the woman for her separate use, and that her receipts alone should be a good discharge for the same. This section did not empower a married woman entitled to stock under its provisions to transfer such stock without the concurrence of her husband, unless and until the stock had been placed under sect. 3 of the Act in her name as a married woman entitled for her separate use (*r*).

It was decided in 1874 that the term "entitled" used in the Act meant "entitled in possession" (*s*).

Previous to 1870, a legacy, if bequeathed to a married woman in general terms, had to be paid to her husband (*t*), unless a protection order or a judicial separation had been obtained under the Divorce Act of 1857, and the same rule applied to the case of intestacy (*u*).

The Act of 1870 also provided (*x*) that a married woman might effect a policy of insurance upon her own life, or upon the life of her husband, for her separate use; and that if a husband should effect a policy of insurance upon his own life, and expressed upon the face of it to be for the benefit of his wife, the same should enure and be deemed a trust for the benefit of his wife for her separate use. It was decided that this provision modified sect. 91 of the Bankruptcy Act of 1869 (*y*). A husband, previous to 1870, had insured his life, and had paid one premium to the insurance company; after the passing of the Act he surrendered the policy, and received another at the same premium, payable to the separate use of his wife; he went into liquidation, and then died. His wife had separate property without power of anticipation, and it was held by the Court of Appeal, reversing the decree of Vice-Chancellor Hall, that the insurance must be taken as

(*r*) *Howard* v. *Bank of England*, L. R., 19 Eq. 295.

(*s*) *Lane* v. *Oakes*, 22 W. R. 709.

(*t*) *Palmer* v. *Trevor*, 1 Vern. 261.

(*u*) *King* v. *Voss*, 13 C. D. 504.

(*x*) Sect. 10.

(*y*) 32 & 33 Vict. c. 71.

having been effected after the passing of the Act, and that, whether the subsequent premiums were paid by the husband out of his own money or out of the income of the wife's separate estate, the money payable on the insurance did not go to the trustee under the bankruptcy, but went to the widow by virtue of the Act, which modified the 91st section of the Bankruptcy Act of 1869 (*z*).

Where a husband effected a policy for the benefit of his wife and children under this section, and died insolvent, leaving his widow in such poor circumstances that the income of the policy moneys was insufficient to support her and her children, the moneys were distributed as if the husband had died intestate (*a*).

A married woman could sue in her own name as if she were a *feme sole* for any wages, earnings, money and property which, by this Act, were declared to be her separate property, or for any property belonging to her before marriage, and which her husband, by writing under his hand, had agreed should belong to her after marriage as her separate property, or for any chattels or other property purchased out of her separate property (*b*).

In the case of *Hancocks* v. *Lablache* (*c*), it was decided that the husband of a married woman must be joined with her as a defendant in an action to charge wages and earnings which were her separate property under the Act of 1870. Lord Justice Lindley, in deciding this case, clearly defined the scope of the last-mentioned section of the Act. He said:—"Before the Married Women's Property Act, 1870, it was well settled in Chancery, as an inflexible rule, to which there were only special exceptions, such as in a case where a husband might be beyond the jurisdiction, that a suit could not be instituted by or against a married woman without the husband being a party. If she were suing by herself or next friend the husband was made plaintiff, and where

(*z*) *Holt* v. *Everall*, 2 C. D. 266.
(*a*) *Re Mellor's Policy Trusts*, 6 C. D. 127; 7 C. D. 200.
(*b*) Sect. 11.
(*c*) 3 C. P. D. 197.

she was sued he was made defendant. Now the first question is, whether, on the true construction of the Married Women's Property Act, 1870, such property as is therein declared to belong to her for her separate use is property in respect of which she can sue and be sued as if unmarried. That it is such as she can sue for is undoubtedly declared in sect. 11, but, save in certain excepted cases, the Act does not expressly render her liable to be sued; and sects. 1 and 11 cannot be construed to mean that the property in sect. 1, declared to belong to her apart from her husband, will, by virtue of sect. 11, belong to her, in all respects, as if she were an unmarried woman. I do not think it mere accident that a different set of phrases was used in sect. 1 and sect. 11. It may have been thought expedient to give the wife power to sue in actions without joining her husband, and yet not to give power to others to sue her without joining him; and I cannot hold that the words in sect. 1 are equivalent to a provision that property therein mentioned shall be deemed to belong to the wife as if she were unmarried. Starting from that point, I come to the conclusion that the property specified in sect. 1 must be treated as belonging to the wife in the manner and to the extent there mentioned, viz., as if settled to her separate use. Whether there has been an intentional or unintentional omission to render the wife liable to suit alone, I cannot supply it . . . . The Act has not altered the law as to the proper mode of suing a married woman in respect of that property which by this Act is made her separate estate. Is there anything in the Judicature Act affecting this question? I think there is nothing which alters the whole law on this point, but it is declared that where there is no provision on the subject in the Act the old practice shall be followed."

If the action were brought by the wife the case was different, and it was not necessary for the husband to be joined as a plaintiff, or for the wife to have a next friend. Thus a married woman could present a petition for payment out of Court to her of her separate property without appearing by her next friend, as if the property belonged to her as

a *feme sole* (*d*). She could sue in her own name for damages for being turned out of her separate property (*e*), and she could bring an action in her own name against her bankers for damages caused by the bankers dishonouring her cheques drawn in the course of her separate business (*f*).

The Married Women's Property Act, 1882 (*g*), completed the revolutions of the common law that had been gradually worked out under the equity judges. It enacts, *inter alia*, that a married woman shall be capable of acquiring, holding, and disposing by will, or otherwise, of personalty, as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*h*). If she carries on a trade separately from her husband she shall, as regards her separate property, be subject to the bankruptcy laws as if she were a *feme sole* (*i*). If a woman marries on or after the 1st of January, 1883, she shall be entitled to hold and dispose of personalty belonging to her at the time of marriage, or acquired by, or devolving upon, her after marriage as her separate property (*k*). Every married woman shall be entitled to hold and dispose of, as her separate property, all personalty, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue on or after the 1st day of January, 1883 (*l*). All deposits in any bank, all annuities, all sums in the public stocks or funds, or any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which, on the 1st of January, 1883, should be standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial or otherwise, or of or in any industrial, provident, friendly, benefit, building or loan

(*d*) *Re Fisher's Trusts*, 30 W. R. 56.

(*e*) *Moore* v. *Robinson*, 27 W. R. 312.

(*f*) *Summers* v. *City Bank*, L. R., 9 C. P. 580.

(*g*) 45 & 46 Vict. c. 75, s. 22.

(*h*) Sect. 1.

(*i*) Sect. 1 (5).

(*k*) Sect. 2.

(*l*) Sect. 5.

society, standing in her name at such date, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that the same are standing in her sole name shall be sufficient *primâ facie* evidence that she is entitled thereto for her separate use (*m*). A married woman may effect a policy of assurance on her own or her husband's life for her separate use, or on her own life for the benefit of her husband or children, or husband and children, or any of them, and a man may effect a policy of assurance on his own life for the benefit of his wife, or his children, or wife and children, or any of them (*n*). The wife is to have the same capacity to take civil and criminal proceedings for the protection of her separate property as a *feme sole* has: in such proceedings the husband and wife are to be competent witnesses, and the mere allegation that the property in dispute belongs to the wife shall be sufficient (*o*).

Shortly stated, the Married Women's Property Act, 1882, puts married women who have been married after the last day of December, 1882, in the same position with regard to their property as they would be if unmarried. It does not attempt, in so many words, to do away with the old common law doctrine of the unity of husband and wife, but it makes that doctrine ineffective; it puts the married woman in the same position with regard to her property as her husband is in with regard to his.

In the case of *In re March*, *Mander* v. *Harris* (*p*), decided by Mr. Justice Chitty on the 18th of June, 1883, it was held that, having regard to the Married Women's Property Act, 1882, the old rule of law that husband and wife were, for most purposes, one person, was no longer applicable to a gift under a will that had come into operation since the commencement of the Act. "Under the Married Women's Property Act, 1882," said his lordship, "is it true to say that husband and wife are one person for most purposes with reference to property? It appears to me there has been so

(*m*) Sect. 6.
(*n*) Sect. 11.
(*o*) Sect. 12.
(*p*) 24 C. D. 222.

extensive an alteration made in the law by this Act, that it would be wrong to apply any longer to the construction of a gift by will the old principle upon which the Courts formerly acted, namely, that for most purposes husband and wife are one person. . . . It appears to me that the Act makes such alterations in the relation of husband and wife that it severs the unity of person, and divides that compound person which the law formerly recognised to such an extent as to render it wrong for the Court to apply the old principle, which was founded on unity of person." Whether the new principle will work well or not time alone will show. It has been tried in America, and has apparently been successful; it was tried at Rome, and was a failure. There is more similarity between the state of society of England and America than between that of England and ancient Rome, and the success of the principle in America makes the success of the principle in England more than probable.

CHAPTER III.

CHOSES IN ACTION.

THE doctrine of the unity of husband and wife has never been applied so strictly to the wife's choses in action as to other classes of her property. Marriage gave the husband not the ownership of his wife's choses in action but her remedies, *i.e.*, her right of action or means for reducing them into possession. As soon as he reduced the chose in action into possession, being then a chose in possession it at once became his absolutely. Reduction into possession is the only way in which a husband can divest his wife of her property in a chose in action (*a*), and the reduction into possession must be done by some act during the coverture (*b*).

If a married woman was possessed of a chose in action, the payment had to be made to the husband and not to the wife, unless the payment was made to the wife as agent of her husband. Thus, where a legacy was left to a married woman who was living apart from her husband, and the husband filed a bill for the legacy, it was held that payment to the wife was no payment at all, and that the executor must pay the legacy to the husband (*c*).

Sir Thomas Plumer, M. R., in an elaborate judgment in 1824 (*d*), thus stated the law relating to a wife's chose in action: "The nature and extent of the husband's interest in and power over the wife's choses in action is of a peculiar nature, but is defined in the clearest manner. Marriage, the law says, is only a qualified gift to the husband of the wife's

(*a*) *Gaters* v. *Madeley*, 6 M. & W. 423; *Prole* v. *Soady*, L. R., 3 Ch. 220.

(*b*) *Hutchings* v. *Smith*, 9 Sim. 137.

(*c*) *Palmer* v. *Trevor*, 1 Vern. 261.

(*d*) *Purdew* v. *Jackson*, 1 Russ. 66.

choses in action, viz., upon condition that he reduce them into possession during its continuance. If he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it. The wife's right is not divested by the marriage. The chose in action continues to belong to her, unless the husband can and does reduce it into possession, and thereby makes it cease to be a chose in action. The husband has not, on the marriage, any immediate property in the chose in action; he has only the right to reduce it into possession, if it be in a state capable of being so reduced. Reduction into possession is a necessary and indispensable preliminary to the husband's having any right of property in himself, or to his being able to convey any right of property to another. If he dies without having been able or willing to perform this condition, the right of the wife continues unaltered, exactly as if she had never married. Her title is the same after her husband's death as it was before her marriage. The husband had a power, but he had never exercised it; or the chose in action was so circumstanced, that he could not exercise it so as to fulfil the condition upon which his title depended."

The chief difficulty in most of the cases on the wife's choses in action has been the determination as to whether the chose in action has or has not been reduced into possession. If the husband merely intended to reduce the chose into possession, this intention was not sufficient; the property had absolutely to be taken away from the wife and vested in the husband. In a case decided in 1803 (*e*), a woman, when under coverture, became entitled to a distributive share of personal estate as next of kin. Part of it consisted of 3 per cent. stock. The administrator transferred her share into her name, describing her as a married woman, and so it stood at his death, except that she had transferred some part of it, with the assent of her husband, signified by his signing his name to each transfer. It was

(*e*) *Wildman* v. *Wildman*, 9 Ves. jun. 174.

argued that the stock remaining in the wife's name was part of the husband's estate, for the transfer of stock into the name of the married woman was equivalent to payment made to her; and as, if money had been paid to her, it would have become the husband's property, so likewise should stock transferred to her in satisfaction of the claim he might have made in her right. But Sir William Grant, M. R., decided against this argument. "There is a great difference," he said, "between a transfer of stock and payment of money. The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption—a mere right therefore: the circumstance that Government is the debtor makes no difference—a mere demand of the dividends, as they become due, having no resemblance to a chattel movable, or coined money, capable of possession and manual apprehension. The power of the husband, stated as large as may be, to dispose of this description of property does not necessarily determine that it is to vest absolutely in him. He has a right to dispose of his wife's term. He may forfeit it. It may be taken in execution for his debts. Still it is not so absolutely his as to be transmissible to his representatives, against her claim surviving him. Assuming, but not giving an opinion, that he had a right to have transferred it into his own or another name, and that the bank could not prevent his doing so, and this Court could not interfere to make a provision for her, still it would not follow that without any act of dominion exercised by him, without anything done by him, exerting that power he had to reduce it into possession, it shall vest in him. The acts he has done are all acts of a contrary tendency. They are indications of assent to her exercising dominion over it. She has transferred parts of this stock. He has not even joined with her as a transferring party. He concurs indeed in the very act by which she assumes to be the sole owner of the stock. Being, therefore, of opinion that the transfer to her did not vest the property in her husband, and being quite clear that he has not done any act

to reduce it into possession, it follows that the claim cannot be supported."

In a case decided in 1835 (*f*), a married woman was entitled under a will to stock and cash forming part of a residue. Her husband wrote to one of the executors requesting that the stock should be transferred into the names of trustees for the wife's separate use, and that the cash should be paid to himself. These requests were complied with. The husband employed part of the cash in increasing the amount of the stock. He afterwards became bankrupt, and died. It was decided that the stock transferred by the executors was not reduced into possession by the husband, and therefore belonged to the wife by survivorship, but that the assignees under the bankruptcy were entitled to the increase made by the husband. A peculiar case on the subject of reduction into possession was decided in 1834 (*g*). The husband of a woman entitled to a legacy of 600*l.*, chargeable, in default of personalty, on the testator's real estate, verbally agreed with the three devisees of the real estate to sell the legacy to them for 200*l.* a-piece, but received the consideration from one only of the devisees, taking interest on the 400*l.* due from the two others, and it was held that, to the extent of 400*l.*, this was not a reduction of the legacy into possession.

It was decided by Vice-Chancellor Stuart in 1860 (*h*), that an equitable mortgage by a husband by deposit of title deeds of property upon which his wife had a security for the payment of money would not bar her right by survivorship to such security.

In 1728 it was held by Lord King, C. (*i*), that if a bond be given to a baron and feme during the coverture, and the baron dies, the bond will survive to the wife, for though it is true that the husband may disagree to the wife's right, and may bring the action on the bond in his own name only, until

(*f*) *Ryland* v. *Smith*, 1 Myl. & Cr. 53.

(*g*) *Harwood* v. *Fisher*, 1 You. & Coll. 110.

(*h*) *Michelmore* v. *Mudge*, 19 L. J. (N. S.), Eq. 609.

(*i*) *Coppin* v. ——, 2 P. Wms. 495.

such disagreement, the right to the bond is in both the husband and the wife, and shall survive.

In 1690 it was held by the Lords Commissioners (*k*) that payment to the husband of the interest on his wife's principal was not a reduction into possession of the principal.

A fund to which a married woman becomes entitled during coverture will not be considered as reduced into possession by the husband where he has not been at any time in a position to assert his rights by action for the amount as money had and received to his use. Thus A., being sole executor and trustee of X.'s will, appointed B. and C. as his co-trustees, and by deed assigned all X.'s property to himself, B., and C., upon the trusts of the will. B. (who was also A.'s solicitor), as trustee, opened an account at a bank in the name of "The executor of X." A share of X.'s estate, to which A.'s wife, or A., in her right, was entitled, having become divisible, B., after advising her as to an investment, drew a cheque in his own name in favour of A.'s wife, and the money was invested in a debenture which was taken in the names of B. and D., as trustees for her; and it was held by Vice-Chancellor James in 1870 that there had been no reduction into possession of the share by A. (*l*).

A woman having a sum of money deposited with a merchant, and standing in her name, married a man whom she afterwards accompanied on a voyage, and both were drowned at the same time. The money was transferred by the merchant into the names of the husband and wife; but the only direction given to the merchant by the husband was to keep this property separate from his other moneys. The husband by his will, after reciting that his wife had, previously to her marriage, deposited with the merchant this money, which was standing in her name, disposed of the property as his own. But it was held by Vice-Chancellor Malins in 1875 (*m*) that the husband had done no act to reduce the wife's money into

(*k*) *Howman* v. *Corie*, 2 Ver. 190.

(*l*) *Aitchison* v. *Dixon*, L. R., 10 Eq. 589.

(*m*) *Scrutton* v. *Pattillo*, L. R., 19 Eq. 369.

possession, and that it would go to her personal representatives.

A legacy to which a married woman was entitled under a will was paid by the executors by means of a cheque for 995*l.*, drawn to the order of the husband and wife. The husband and wife indorsed the cheque, and then went together to the husband's bankers, when the wife handed the cheque to the manager, and, in the presence of and with the assent of the husband, told the manager to open an account in her own sole name, and to place to her credit 800*l.*, part of the 995*l.*, and to credit the residue to the husband's current account. This was done, and the wife afterwards, from time to time, drew cheques on the amount in her sole name. The husband never interfered with the account. The wife drew various cheques for amounts varying from 20*l.* to 50*l.* in favour of the husband, for the purpose of those sums being employed by him in his business. Part of the money was, by the wife's directions, invested by the bankers in the purchase of some bonds, they sending her a memorandum which stated that they held the bonds as her property. The husband afterwards asked the wife to sign a memorandum charging her money and securities with the payment of the overdrawn balance of his account with the bankers, but she refused to do so. Under these circumstances it was decided by Mr. Justice Fry in 1879 that the legacy had never been reduced into possession by the husband (*n*).

In the foregoing cases the acts of the husband were not sufficient to reduce the wife's choses in action into possession; the following cases will show what acts have been considered sufficient by the Court.

A married woman who was the committee of the estate and person of her lunatic husband was entitled to stock which was standing in the name of a trustee for her; this stock was, under an order made in the lunacy, transferred into the name of the accountant-general, in the matter of the lunacy, and part of it was afterwards sold out and applied in

(*n*) *Parker* v. *Lechmere*, 12 C. D. 256.

payment of costs; the lunatic died leaving his wife him surviving. Lord Lyndhurst, C., in deciding this case in 1828 said, "The mode in which this stock has been dealt with amounts to a reduction into possession by the husband. Payment by the trustees to the lunatic, or to the committee, would have been a reduction into possession: payment into Court to the credit of the lunacy is equally a reduction into possession for the lunatic, and for the lunatic only. The Lord Chancellor, acting for the lunatic, has taken possession of the fund for the lunatic's benefit—has exercised dominion and control over it—and has administered it on behalf of the lunatic" (*o*).

A husband being entitled in right of his wife to a share of certain engravings which were in the hands of T. as agent for the parties entitled, sold his wife's share to T., subject to a stipulation that six engravings should be delivered to him in specie. He received the purchase-money, but the six engravings were not delivered. The owners of other shares made similar sales to T. The husband died in the lifetime of his wife. The engravings remained in T.'s possession till his death, and were sold in a suit for the administration of his estate; and it was held by the Court of Appeal in 1877, affirming the decision of Sir Richard Malins, V.-C., that the husband had reduced the chattels into possession (*p*).

In 1879 Mr. Justice Fry, following the decision of *Huntley* v. *Griffith* (*q*), held that the receipt by an agent, appointed by husband and wife, of money forming part of the estate of an intestate of which the wife was administratrix, amounted to a reduction into possession by the husband of the wife's distributive share of the money (*r*). The case of *Huntley* v. *Griffith* is thus stated in F. Moore, "Le case fuit que un legacy fuit devise al un feme sole que prist baron, et ils font letter d'attorney al un pur ceo receiver, que ceo receive accordant; la feme morust, le baron apres morust intestate, et son

(*o*) *In the Matter of Jenkins*, 5 Russ. 183.

(*p*) *Widgery* v. *Tepper*, 5 C. D. 516; 7 C. D. 423.

(*q*) F. Moore, 452; Goldsborough, 159.

(*r*) *Re Barber, Dardier* v. *Chapman*, 11 C. D. 442.

administrator port accompt pur l'argent. Et adjuge maintainable, quia le receit alter le prop'ty del legacy al baron sole. Sic sur obligac'on al feme et le baron fait letter d'attorney de receiver l'argent, quel ē receive la feme devie, le baron devie, son executor aura accompt pur l'argent."

Lord Kenyon, C. J., in delivering a judgment in 1790 said, "It is extremely clear on the one hand that the marriage gives to the husband all the personal estate which the wife has in possession: it is also clear on the other hand that where a chose in action of the wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it must be brought in the names of both the husband and wife" (*s*).

It was at one time thought that if the chose in action accrued to the wife during coverture and not while she was unmarried, that the husband had the option of joining his wife with him as co-plaintiff or not as he wished, but Chief Justice Tindal in 1834 said, "This case resembles that of a bond given to the wife during coverture. The interest of the wife forms a substratum, upon which her right to join in an action may be founded" (*t*).

Where a wife who, previous to her marriage, had lent money, joined with her husband in an action to recover the same and died pending the action, it was held, by Chief Justice Abbott in 1827, that the action thereby abated, and that the defendant could not afterwards have judgment as in case of nonsuit (*u*).

The wife's bills of exchange and promissory notes may be considered as property of a mixed nature; to a certain extent they are choses in action, but they have several characteristics of choses in possession; the property vests in the husband by delivery to the wife, no interest passes to the wife's indorsee, the husband alone being the person to indorse (*x*).

Where a bill of exchange was payable to a *feme sole* who

(*s*) *Milner* v. *Milnes*, 3 Dur. & Ea. 631.

(*t*) *Wills* v. *Nurse*, 1 Adol. & El. 65.

(*u*) *Checchi* v. *Powell*, 6 Bar. & Cress. 253.

(*x*) *Barlow* v. *Bishop*, 1 Term Rep. 432.

intermarried before the same was due, it was held, in 1818, by Lord Ellenborough and Justices Bayley, Abbott and Holroyd, that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill (*y*); and this decision was followed by Sir John Leach in 1821 (*z*). The footnote to the case decided by Sir John Leach says, "The decision in this case seems to have proceeded on the ground that a bill of exchange, being transferable by law, and the right of action shifting with the possession of it, is to be considered, not as a chose in action, but rather as a chattel personal, vesting in the husband by the act of marriage." However, if the husband do not reduce his wife's negotiable securities into possession during the coverture, they will pass to the wife if she survive her husband, which shows that they still retain their nature of choses in action (*a*).

It has been held, that if a husband and wife be co-plaintiffs in an action for reduction into possession of a chose in action, and if before execution but after judgment the husband die, the judgment will survive to the wife; but on the other hand, if a *feme sole* obtain a judgment in such an action and then marry, and she and her husband obtain an award of execution, the property will belong to the husband (*b*).

In 1791 a sum of money having been ordered to be paid to the husband in right of his wife, he died before payment; and, upon the wife's application for the money, the executor submitted whether he was not, as such, entitled to it. Lord Thurlow, C., held, that it was a vested interest in the husband, and ordered it to be paid to the executor (*c*). The same rule applies to the case of an award by an arbitrator. Thus, a married woman being entitled as residuary legatee to the surplus of the personal estate of a testator, and a

(*y*) *M'Neilage* v. *Holloway*, 1 Bar. & Ald. 218.

(*z*) *Ex parte Barber, In re Shaw*, 1 Glyn & Jameson, 1.

(*a*) *Howard* v. *Oakes*, 3 Ex. 136; *Gaters* v. *Madeley*, 6 M. & W. 423; *Richards* v. *Richards*, 2 B. & Ad. 447; *Sherington* v. *Yates*, 12 M. & W. 855.

(*b*) 1 Rop. 212.

(*c*) *Heygate* v. *Annesley*, 3 Bro. C. C. 362.

difference arising between her husband and the executor touching the quantum of this residue, the matter was referred to arbitration, and an award was made that the executor should pay 1,500*l.* to the husband; but before anything further was done the husband died, and the question arose whether the wife or the executor of the husband was entitled to the money. It was held, by the Lord Chancellor in 1686, that the award was a sort of judgment, and an arbitrator having awarded that the 1,500*l.* should be paid to the husband, that award had changed the property, and vested it in the husband (*d*).

Where a husband under a decree to propose a settlement of stock belonging to his wife transferred to the accountant-general by order, come to an agreement with her out of Court, and while they lived apart, but not legally separated, to take part and give up the rest, the Master of the Rolls held, in 1798, that the agreement did not bind the wife, and the husband dying before any steps were taken for executing it, the whole survived to the wife (*e*).

As before stated, if the money comes into the hands of the husband the wife's right of survivorship is at once defeated, but it was held, in 1806, that if the property come into his hands as trustee or executor, and not as husband, the wife's right of survivorship would not be defeated (*f*).

It was provided by the Divorce and Matrimonial Causes Act, 1857 (*g*), that in every case of a judicial separation, or where the wife should have obtained a protection order, she should, from the date of the sentence, and whilst the separation or protection order should continue, be considered as a *feme sole* with respect to property of every description which she might acquire, or which might come to or devolve upon her, provided that if such wife should again cohabit with her husband, all such property as she might be entitled to when such cohabitation should take place, should be held to her

(*d*) *Oglander* v. *Baston*, 1 Vern. 396.

(*e*) *Macaulay* v. *Philips*, 4 Ves. jun. 15.

(*f*) *Baker* v. *Hall*, 12 Ves. jun. 497.

(*g*) 20 & 21 Vict. c. 85.

separate use (*h*); and the wife was to be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding (*i*). Where a woman who had obtained a protection order applied for payment to her of her share in a testator's estate, it was held by V.-C. Hall, in 1875, that evidence must be produced that the separation was a continuing one (*k*).

Previous to the Judicature Act of 1873 (*l*) a legal chose in action was not assignable; there were, however, some exceptions to the rule, as, for example, bills of exchange and promissory notes; but by sect. 25, sub-sect. 6, of that Act, debts and other legal choses in action were made absolutely assignable by writing under the hand of the assignor, provided that express notice in writing were given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or chose in action. But an equitable chose in action has always been considered assignable. Thus if a husband assigned his wife's chose in action, the Courts of equity would assist the assignee in reducing it into possession. But it did not necessarily follow that because a husband had assigned his wife's chose in action that the assignee thereupon became absolutely entitled; all that the Courts of equity did was to place the assignee in the same position with regard to the chose in action as the husband had been in. "It would seem strange," said Sir William Grant, in 1803 (*m*), "that a man should in any way be able to transfer to another a larger or better interest than he has in himself." The assignee would obtain the husband's power of reduction into possession, but he would take subject to the wife's right of survivorship (*n*).

If the chose in action be one that is available for reduction into possession, the assignee could, by reducing it, defeat the wife's claim; but if the chose were one not available for

(*h*) Sect. 25.
(*i*) Sect. 26.
(*k*) *Ewart* v. *Chubb*, L. R., 20 Eq. 454.
(*l*) 36 & 37 Vict. c. 66.
(*m*) *Mitford* v. *Mitford*, 9 Ves. jun. 99.
(*n*) *Whittle* v. *Henning*, 2 Phill. 731.

reduction into possession, he could stand in no better position than the husband, and therefore took subject to the wife's claim.

Where a husband and wife by deed executed by both assigned to a purchaser for valuable consideration a moiety of a share of an ascertained fund, in which the wife had a vested interest in remainder, expectant on the death of a tenant for life of that fund, and both the wife and the tenant for life outlived the husband, it was held in the case of *Purdew* v. *Jackson*, by Sir Thomas Plumer, M. R., in 1823, that the wife was entitled by survivorship to claim the whole of her share of the fund, against such particular assignee for valuable consideration (*o*). Mr. Macqueen, in commenting on this case, in 1872, remarks (*p*), that the decision did not satisfy the lawyers, and had proved inconvenient in practice, and submitted that it would have been better had Sir Thomas Plumer allowed the husband and wife the power of disposal, subject to the wife's equity to a settlement. However, such was the decision of the Master of the Rolls, and it has always been considered good law. It was followed by Lord Lyndhurst, in 1828, in the case of *Honor* v. *Morton* (*q*), in delivering judgment in which case the Lord Chancellor said (*r*), "When the husband assigns the chose in action of his wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor; and that he, too, must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done: and, therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. On

(*o*) 1 Russ. 1.
(*p*) Husb. & Wife, 2nd ed. 49, n. (*p*).
(*q*) 3 Russ. 65.
(*r*) page 68.

the other hand, I should also infer that where the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property till, by subsequent events, he comes into the situation of being able to reduce the property into possession, and then his previous assignment will operate on his actual situation, and the property will be transferred." "I confess," he continued (*s*), "I revert to my original opinion—the opinion which I should have pronounced, if the subject had been untouched by authority—that the husband has no power to give effect to a conveyance of property of this description, unless circumstances so turn out as to have put him in a situation which enabled him to have reduced the chose in action into possession. If, at the time of the assignment, he is in a condition to reduce the chose in action into possession, the assignment operates immediately; if he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative."

The first point of Lord Lyndhurst's judgment, namely, that if at the time of the assignment the husband is in a condition to reduce the chose in action into possession the assignment would operate immediately, has been since decided, and his opinion not followed. A married woman, being entitled to one-fifth of a residue, joined with her husband and the four other residuary legatees in filing a bill to have the testator's estate administered, and the residue ascertained and distributed amongst the parties entitled. Pending the suit, but before the rights of the parties had been declared, the husband and wife joined in assigning the wife's share to A., as a security for a debt due to him from the husband. The husband died, and afterwards a decree was made, directing one-fifth of the residue to be paid to the wife. A. never presented a petition in the suit, or took any other step to enforce his security, until after the decree was made. The case came

(*s*) page 86.

before Sir Lancelot Shadwell, V.-C., in 1838, and the before-mentioned words of Lord Lyndhurst were quoted in favour of A. The Vice-Chancellor, however, did not follow them, but decided that the wife became entitled to her share free from her husband's debts (*t*).

In a case decided by Sir Lancelot Shadwell in 1843 (*u*), by articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased grandfather's residuary estate, to which she was entitled under the trusts of his will, to trustees in trust for themselves and their children, and, after the lady had attained twenty-one, a settlement was made in pursuance of the articles, but before the settled property was transferred to the trustees the husband died. It was held that the wife's right to the property by survivorship was not barred. "I consider the principle laid down by Sir Thomas Plumer, and twice affirmed by the Lord Chancellor, to be decisive of the present question," says the Vice-Chancellor in his judgment, "whether the husband dies in the lifetime of the tenant for life, whereby the chose in action cannot, as against the wife, be reduced into possession, or whether he survives and dies before it is reduced into possession, the same result must, in my opinion, follow." The point was again argued before the same judge in 1844 (*x*). A female infant, being entitled to a reversion of a chose in action expectant on the decease of the survivor of A. and B., she and her husband covenanted, in contemplation of their marriage, to assign it to trustees in trust, as to one moiety, for the husband absolutely, and as to the other moiety for the wife and the issue of the marriage. The husband died first, and afterwards A. and B. died. The Vice-Chancellor said that a husband could not assign his wife's present chose in action, except subject to the contingency of his not reducing it into possession; that he remained of the same opinion as he

(*t*) *Hutchings* v. *Smith*, 9 Sim. 137.

(*u*) *Ellison* v. *Elwin*, *Elwin* v. *Williams*, 13 Sim. 309.

(*x*) *Le Vasseur* v. *Scratton*, 14 Sim. 116.

had expressed in *Elwin* v. *Williams*, which was substantially the same as the present case, and should decide accordingly.

The second point of Lord Lyndhurst's opinion, namely, where the husband had not the power of reducing the property into possession at the time of the assignment, but acquired the power afterwards, arose in a case before Vice-Chancellor Knight-Bruce in 1844 (*y*). A husband assigned his wife's reversionary chose in action to a particular assignee for value. He survived the person upon whose life the reversion depended, but died without actually reducing the property into possession. The assignment was held to be void as against the surviving wife.

Lord Lyndhurst's third point, namely, that if the husband dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative, is undoubtedly correct. A wife's leaseholds were, on her marriage, limited to her absolutely in the event of her surviving her husband, but without any trust for her separate use, and it was held by Sir John Romilly, M. R., in 1852 (*z*), that the husband could not, during the coverture, dispose of this contingent reversionary interest of his wife in the term, for although a husband could, as a rule, make a valid assignment of his wife's reversionary interests in leaseholds, still he could not do so if the interest were of such a nature that it could not by any possibility vest in the wife in possession during the coverture.

In 1836 it was decided by Lord Cottenham, C., that a husband and wife could not effectually dispose of the life interest of the wife in a fund not settled to her separate use beyond the duration of the coverture (*a*). In this case a testator gave his residuary estate to trustees upon trust to invest the proceeds, and pay the profits, dividends or interest thereof to the separate use of his daughter for life, exclusive of any husband she might marry, without power of anticipa-

(*y*) *Ashby* v. *Ashby*, 1 Collyer, 533.

(*z*) *Duberley* v. *Day*, 16 Beav. 33.

(*a*) *Stiffe* v. *Everitt*, 1 Myl. & Cr. 37.

tion, but with a power to appoint the capital of the fund, such appointment to take effect only from and after her decease. The daughter, who at the date of the will, and at the testator's death, was a *feme sole*, afterwards married, and joined with her husband in petitioning to have the fund transferred to him absolutely, offering, at the same time, to execute any appointment which the Court might think proper for that purpose; but the Court refused to make any order. The Lord Chancellor remarked, "When this petition came on to be heard, it was assumed that the only question was the authority of some late decisions with respect to property left to the separate use of a woman not married at the time; but I suggested another difficulty, namely, with respect to the power of the husband to dispose of his wife's life interest when not settled to her separate use; and the petition stood over for the purpose of enabling the petitioner's counsel to produce cases in favour of such right. I have since been informed that no such cases are to be found. It is, I believe, certain that there are none; and the question is, whether consistently with the doctrine established in *Purdew* v. *Jackson*, and *Honor* v. *Morton*, any such power can exist. This very point is just alluded to in a note to *Purdew* v. *Jackson*, but there is no decision upon it. I do not see how, consistently with the cases of *Purdew* v. *Jackson* and *Honor* v. *Morton*, the husband can make a title to such of the dividends of the fund as may accrue after his own death and during the life of his wife surviving him. In the absence, therefore, of any authority, and without any argument in support of the claim, I cannot make the order prayed." It may be remarked in passing that the "late decisions" referred to by the Lord Chancellor, namely, *Massey* v. *Parker* (*b*), *Newton* v. *Reid* (*c*), *Woodmeston* v. *Walker* (*d*) and *Brown* v. *Pocock* (*e*), were overruled by him in 1840 in the case of *Tullett* v. *Armstrong* (*f*).

(*b*) 2 Myl. & Keen, 174.
(*c*) 4 Sim. 141.
(*d*) 2 Russ. & Mylne, 197.
(*e*) 2 Russ. & Mylne, 210.
(*f*) 4 Mylne & Cr. 377.

It is difficult to reconcile the foregoing cases with the decision of Sir Lancelot Shadwell in 1842 in the case of *Hore* v. *Becher* (*g*). In this case a single woman, being entitled to an annuity secured by bond, married. Her husband executed a release of the annuity, and died, leaving his wife surviving, and it was held that as he could release the security he could release the annuity, so as to bind his wife. Now, if this were good law, the decisions in *Purdew* v. *Jackson* and *Stiffe* v. *Everitt* could nearly always be evaded. But in Comyn's Digest it is stated (*h*) :—"If the wife has an annuity for life, and the husband release to the grantor by deed, and die, the wife shall have it, for the release of the husband discharges it only during the coverture, it being an estate for life."

The assignment of the wife's chose in action, though otherwise good, will be bad, unless the assignee actually reduce it into possession before the death of the husband. Thus, in the previously-mentioned case of *Hutchings* v. *Smith* (*i*), Sir Lancelot Shadwell held that a married woman was entitled to her share in a residue as against the assignee of the married woman and her husband, the assignment being to secure the husband's debt, and the assignee having taken no steps to enforce his security previous to the husband's death.

In a case decided in 1838, a married woman had an interest in possession in a legacy, and her husband became bankrupt. The assignee in bankruptcy filed a bill against the testator's executors, to compel payment to him of the legacy. Soon afterwards the husband died, and it was held that the widow, and not the assignee, was entitled to the legacy (*k*).

In 1843 it was held by Lord Abinger, C. B., in the case of *Yates* v. *Sherrington* (*l*), that the assignees of a bankrupt might maintain an action in their own names only for a chose in action belonging to the wife of the bankrupt before marriage, as a promissory note given to her *dum sola*, and

(*g*) 12 Sim. 465.
(*h*) Tit. Baron & Feme (F. 1).
(*i*) 9 Sim. 137.
(*k*) *Pierce* v. *Thorney*, 2 Sim. 167.
(*l*) 11 Mee. & Wel. 42.

that in such action the defendant could not set off a debt due to him from the bankrupt. But the defendant took the case to the Court of Exchequer Chamber, which decided that the assignees of a bankrupt could not maintain an action in their own names alone on a promissory note made to the wife of the bankrupt before her marriage.

In 1823 Sir Thomas Plumer, M. R., refused to take the consent of a married woman to give up her reversionary interest, in part vested and in part contingent in a fund in Court, in favour of a purchaser from her husband. In this case (*m*) a testator left a sum of 6,000*l.* upon trust to invest the same and pay the dividends to his daughter, A., and her husband, and after the death of the survivor upon trust for the children of A. equally on attaining twenty-one. The testator died and the 6,000*l.* was, by order of Court, invested in 11,000*l.* consols. A petition was presented by B. and her husband and S., which, after stating that A. and her husband were still living and had nine children, of which B. was one, and had attained twenty-one, but that seven of the other children were under that age, went on to state that B. and her husband had contracted with S. for the sale to him of their reversionary interests, as well vested as contingent, but that S. was unwilling to complete the purchase unless B. would forego all her rights in the said stock; the petition therefore prayed that the petitioner B. might be examined for the purpose of testifying her consent to the transfer of her share or shares of the said consols to S., but Sir Thomas Plumer, upon the petition being opened, refused to take the consent. The point again arose in 1843 before the Master of the Rolls and Lord Sugden, C. (*n*). In 1809, by a marriage settlement, a sum of 1,000*l.* was vested in trustees upon trust to pay the interest thereof to the husband and wife for their lives and the life of the survivor; and after the death of the survivor upon trust for the children of the marriage in such shares as the husband should appoint, and,

(*m*) *Wade* v. *Saunders*, Turn. & Russ. 306.

(*n*) *Box* v. *Box*, *Box* v. *Jackson*, Drury, 42.

in default of appointment, share and share alike. There were three daughters, issue of the marriage, and in 1824 the husband died without appointing the fund, leaving his wife and the three daughters him surviving. A suit having been instituted in relation to the property of the mother and daughters, this sum of 1,000*l.* was paid into Court, invested in Government Stock, and transferred to the credit of the cause. One of the daughters subsequently married, but without making any settlement of her share of the fund. The three daughters having attained their full age, entered into a consent that the entire fund should be paid to the mother. This consent was signed as well by the three daughters as by the mother and the husband of the married daughter. But it was held that the Court had no jurisdiction to take the consent of the married daughter to dispose of her interest in remainder expectant upon the death of her mother, the tenant for life of the fund.

This question as to whether a husband and wife could dispose of the wife's reversionary choses in action was finally determined, in 1848, by Lord Cottenham, C. (*o*). A fund in Court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son, by deed, surrendered and released their respective interests to the wife for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by the three for payment of the fund to the son was refused, on the ground that the Court would not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from the marital control. Lord Cottenham in his judgment remarked, "It is true that the wife in this case has not only a present life interest from her husband, but the ultimate interest in the fund from her son, and therefore, it is said, has a present absolute title to the whole. This proposition assumes that her reversionary life interest no longer

(*o*) *Whittle* v. *Henning*, 2 Phill. 731.

exists; that it is, in fact, merged in the other interests so conferred upon her by her husband and son. But this can only prevail if the Court should, by analogy to law, establish an equitable merger for the sole purpose of depriving the wife of this protection to her reversionary interest which it has hitherto afforded, which would be to permit a supposed analogy to the rules of law to defeat the rules and practice of this Court in the protection it affords to married women, although in all other cases it disregards the rules of law and the rights of husbands when they interfere with such rules and practice."

Where a testator by will gave all his estate (which consisted wholly of personalty or of real estate distributable as personalty) to his wife absolutely, "for the benefit of herself and children," and appointed her executrix of his will, and one of the daughters married during the lifetime of the mother; it was held by Vice-Chancellor James, in 1869, that the children took as joint tenants, and, *semble*, that the wife took only an estate for life; and, further, that the daughter did not, by her marriage, sever the joint tenancy (*p*).

Such, then, was the law relating to the assignment of a married woman's reversionary chose in action down to the year 1857, when it was provided by the enactment, generally known as Sir Richard Malins' Act (*q*), that after the 31st day of December, 1857, it should be lawful for every married woman, by deed, to dispose of every future or reversionary interest, whether vested or contingent, of such married woman or her husband in her right, in any personal estate whatsoever, to which she should be entitled under any instrument made after the 31st day of December, 1857, provided that she was not restrained from alienation by the deed, will, or instrument, creating the interest (*r*). Every deed to be executed in England or Wales by a married woman for any of the purposes of the Act, had to be acknowledged by her, and to be otherwise perfected

(*p*) *Armstrong* v. *Armstrong*, L. R., 7 Eq. 518.

(*q*) 20 & 21 Vict. c. 57.

(*r*) Sect. 1.

in the manner prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land by the Abolition of Fines and Recoveries Act (*s*). By section 79 of this Act, a married woman had to acknowledge her deed before a judge of one of the superior Courts of Westminster, or a master in Chancery, or before two perpetual commissioners, or two special commissioners. In 1856 it was enacted that the acknowledgment might be made before a judge of one of the County Courts (*t*), and by the Conveyancing Act of 1882, it was provided that the acknowledgment should be made before one instead of two commissioners.

Since 1870 a married woman has been enabled to sue for her chose in action, provided that it fell within the provisions of the Married Women's Property Act, 1870 (*u*). As before stated, if the husband survive the wife, the wife's chose in action will belong to him as her administrator. Thus, where a woman, being entitled to a legacy on the death of another person, married and died in the lifetime of her husband, who also died before the legacy had become payable, and without having taken out administration to his wife, it was held by Lord Penzance in 1872, that the legacy formed part of the estate of the husband, and that administration in respect of such legacy could only be granted to the representative of the husband (*x*).

The right of the husband to administer to the estate of his deceased wife has been a right of gradual growth. At the common law no person had the right to administer, and the Ordinary could grant administration to whomsoever he pleased until 1529, when a statute passed in the twenty-first year of the reign of Henry the 8th, gave the right of administration to the next of kin; and, if there were persons of equal kin, whoever took out administration first, was entitled to the surplus. In 1670, administrators were by statute (*y*) made

(*s*) 3 & 4 Will. 4, c. 74.
(*t*) 19 & 20 Vict. c. 108, s. 73.
(*u*) 33 & 34 Vict. c. 93.
(*x*) *Goods of M. A. Harding*, L. R., 2 P. & D. 394.
(*y*) 22 & 23 Car. 2, c. 10.

liable to make distribution, but as the Act made no mention of the husband administering to his wife, he was held not to be within the Act. To obviate all doubt on this question, it was enacted in 1677 (*z*), that the husband might demand administration of his deceased wife's personal estate, and recover and enjoy the same as he might have done before the statute of 1670 before mentioned. Still it was doubted after the statute of 1677 whether, if the husband having survived his wife, afterwards died without having reduced her chose in action into possession, his representative or his wife's next of kin were entitled to the benefit of it; but, by a series of cases, it was eventually settled that the representative of the husband was entitled: that the right of administration followed the right of the estate, and ought in case of the husband's death after the wife, to be granted to the next of kin of the husband.

The Married Women's Property Act of 1882 (*a*) has placed the married woman in the same position with regard to her chose in action as she would be in if she were a *feme sole*, but its provisions only apply to the property of women married after the 31st of December, 1882, and to the property of married women coming to them after that date, although they had been married previous to that date. By the 1st section of the Act a married women is made capable of acquiring, holding and disposing by will or otherwise of any personal property as her separate property, in the same manner as if she were a *feme sole;* by the 2nd section, every woman who marries after the commencement of the Act shall be entitled to have and to hold, as her separate property, and to dispose of all the personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage; and by the 24th section the word "property" includes a thing in action.

It was held by Mr. Justice Fry, in the case of *Re Biaggi* (*b*), in 1882, that a husband's interest before the Act of 1882,

(*z*) 29 Car. 2, c. 3, s. 25.
(*a*) 45 & 46 Vict. c. 75.
(*b*) W. N. 1882, 65.

in his wife's choses in action, which he had not reduced into possession was not a mere possibility, but property, subject to the condition that he must reduce it into possession; it is not easy to reconcile this with the statement of Sir Thomas Plumer, in the leading case of *Purdew* v. *Jackson*, before mentioned, namely, that "The husband has not, on the marriage, any immediate property in the chose in action; he has only the right to reduce it into possession, if it be in a state capable of being so reduced."

CHAPTER IV.

CHATTELS REAL.

A LEASEHOLD was considered at common law an interest intermediate between an estate for life and a tenancy at will. Landowners who possessed large tracts of land, and who were unacquainted with the arts of husbandry, found it beneficial to lease out their lands, which would otherwise have run to waste. This system of leasing for years was considered most beneficial, both for the desire of the landlord and for the expectation of the lessee, for if the lands had been let for the life of the lessee, the lessee would have had too great a power over the landlord, and if they had been let at will the possession of the lessee would have been too precarious for him to bestow any great industry on the improvement of the land.

Originally, leaseholds were not considered as an important class of property, the tenant having only "*utile*," not "*directum dominum*," and being said "*tenere nomine alieno*," and as he had only the perception of the profits, whoever recovered the freeholds reduced likewise the possession; and the lessee's sole remedy was an action of covenant against the lessor, and this, at least, was thought a just construction, that the lessor, who had divested himself of the profits of his lands for a time, by giving them to another, should be obliged to maintain that gift, or be liable to make satisfaction if he did not, particularly because the lessee was equally bound to answer and make good the rent during the time, and, if he did not, the law allowed the lessor to maintain an action of covenant, as well as of debt, against him. The Courts considered a lease to be nothing more than a contract or agreement between the parties, and not such an act as transferred any property to the lessee. This is one of the

reasons why leases for years were considered as chattels, and went to the executors, and not to the heir. Another reason was, because leases were at first made only for a small number of years, and the reason of them being short was, that the object of the lease was to obtain cultivation of the land, and not to obtain a security for money. Lord Coke tells us that by the ancient law of England no lease could be made for more than forty years. Blackstone, however, doubts this; and if the rule ever existed, there can be no doubt that it shortly went into disuse, for long terms of three hundred years, or a thousand years, were certainly in use at the time of Edward the 3rd, and probably at the time of Edward the 1st. There was another reason, namely, leaseholds could be destroyed by the freeholder by a recovery, for the person coming in by the recovery was supposed to come in by title paramount, and consequently was not bound by the lease, so that no man cared to take a lease for any long period, since the lease could be so easily defeated. A lessee was, in fact, regarded as a kind of bailiff, accountable to the landlord at an annual rent.

Now, although in the reign of Henry the 7th, it was resolved that the lessee might not only recover damages in the case of lost possession, but should also recover the possession itself by means of *ejectio firmæ*, the modern ejectment, and although a statute passed in the reign of Henry the 8th (*a*) gave the termor power to falsify all manner of recoveries had against the freeholder, upon feigned and untrue titles, yet no alteration was made in the succession to leaseholds; and the law having been formerly settled as to that point, they remained personal property, descendible to the personal representative. Under these circumstances, it is not surprising to find that the doctrine of conjugal unity applied to the wife's leaseholds. The husband's rights over his wife's leaseholds were stronger than over her choses in action, but not so strong as over her choses in possession.

At common law, marriage operated as a gift to the hus-

(*a*) 21 Hen. 8, c. 15.

band of his wife's leaseholds, and he could dispose of them during his lifetime by grant or demise. Upon an execution against him for his debts, the sheriff might sell his wife's leaseholds, but the husband could not dispose of them by his will. If he survived his wife they belonged to him *jure mariti*, without the necessity of taking out letters of administration, but if he made no disposition of them in his lifetime, and died before his wife, they reverted again to the wife. This was the common law, applicable not only to leaseholds, but also to estates by statute merchant, statute staple, elegit, wardships, and other chattels real of a married woman.

The alienation of the wife's leaseholds by the husband could be either with or without consideration. "They will survive," said Sir William Grant in 1803, "if no act is done by him, but he may assign them, which passes the legal interest, whether with or without consideration" (*b*).

In 1741 a husband agreed to assign his wife's chattel real, but died without doing so; and Lord Hardwicke held that the agreement amounted in equity to a disposition of the chattel real (*c*).

If the husband assigned his wife's trust term the assignment was good, but the assignee took subject to the wife's equity to a settlement. It was held in 1583, that if a man were possessed of a term in the right of his wife, and granted parcel of it to another, after the death of the husband the wife should have the residue of the term that was not granted (*d*). Lord Coke thus states the law on this point (*e*): —"If a man be possessed of a terme of forty years in the right of his wife, and maketh a lease for twenty years, reserving a rent, and die, the wife shall have the residue of the terme, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease. A disposition of part of the terme is no disposition of the whole. But if the husband grant the whole terme, upon condition that the grantee shall pay a

(*b*) *Mitford* v. *Mitford*, 9 Ves. 87.

(*c*) *Bates* v. *Dandy*, 2 Atk. 207.

(*d*) *Syms case*, 1 Cro. Eliz. 33.

(*e*) Co. Litt. 46 b.

summe of money to his executors, &c., the husband die, the condition is broken, the executors enter; this is a disposition of the terme, and the wife is barred thereof, for the whole interest was passed away" (*e*).

But if a lease were made to a man and his wife for the term of their lives, with remainder to the executors of the survivor of them, and the husband granted away the term and then died: this would not bar the wife, for the wife had only a possibility and not an interest (*f*).

The husband could defeat his wife's survivorship without express alienation, thus, "Si feme, lessee pur an, prist baron qui puis accept un novel leas pur leur vies, ceo est un surrender del primer leas" (*g*).

The husband had the power of selling not only the wife's chattels real in possession, but also her reversionary interest in chattels real. Thus a testator by his will gave a term of years to trustees upon trust for his son for life, and after his death for such child or children as he should leave at his decease. The testator's son had a daughter who married during the life of her father; she then joined with her husband in assigning her contingent interest in the term for valuable consideration. The husband then died, and the wife on the death of her father claimed the term on the ground that the assignment was void; but it was held by Sir John Leach, in 1831, that the surviving wife was bound by the sale, though the husband had died before the contingency was determined, and before the reversion fell into possession. The Master of the Rolls remarked, "It is clear that the wife's contingent interest in a term may be sold by the husband; and there is no difference in equity between the legal interest in and the trusts of a term" (*h*).

Commenting on this case, and on the case of *Purdew* v. *Jackson* (*i*), in 1843, Lord Sugden, C., remarked, "I am glad to observe, however, that in the case of *Donne* v. *Hart*,

(*e*) *Sic.*
(*f*) Co. Litt. 46 b.
(*g*) Rolle, Abr. 495, pl. 50.
(*h*) *Donne* v. *Hart*, 2 Russ. & Myl. 360.
(*i*) 1 Russ. 48.

the Court has refused to extend the doctrine to chattels real" (*i.e.* the doctrine of *Purdew* v. *Jackson*). "I think the doctrine has already been carried far enough, and ought not to be extended" (*k*).

In a case decided in 1823 (*l*), a *feme sole* executed a mortgage, and afterwards married; the mortgage was then transferred, and the husband joined in the transfer, and covenanted to pay the money. During the coverture, the husband by gradual payments out of his own property reduced the money due upon the mortgage. By his will he made a disposition of the mortgaged premises, and died in the lifetime of his wife; upon a bill by the wife, who claimed to be entitled by survivorship to redeem the mortgage, the redemption was decreed by Sir Thomas Plumer upon the terms, that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property in reduction of the mortgage debt.

A husband executed mortgages of his wife's equitable chattels real, and died in his wife's lifetime without having paid the mortgage money, and it was held by Vice-Chancellor Knight Bruce, in 1845, upon the construction of the instruments of mortgage, that the transactions were intended solely as a security to the mortgagees for the money lent, and not as a reduction of the chattels into the husband's possession; and consequently that the wife by survivorship was entitled to the equity of redemption. The Vice-Chancellor, in his judgment, said, "Now, that these alienations became absolute at law no one can doubt, as the money was not paid in either case at the time appointed. They became absolute at law in the husband's lifetime. It is quite clear, and has been admitted on both sides that, as far as the mortgagees were concerned, the assignment has never become absolute in equity. The mortgages are still redeemable in equity by some person or persons; but the question is, whether the alienations

(*k*) *Box* v. *Jackson*, Drury, 84. (*l*) *Pitt* v. *Pitt*, Turn. & Russ. 180.

which I have mentioned have become absolute in equity in favour of the husband, or his alienees, the mortgagees, against the wife, who has survived the husband. This depends upon the intention of the husband, to be collected from some, or one, or all of the instruments executed by him. As I read the instruments, not one of them exhibits that intention. The only intention on the part of the husband was to give the alienees security for the money advanced. It does not appear to me that the wife's rights in equity are more prejudiced than if a mere deposit of the deeds had been made by the husband for securing the money. The mortgages were mere pledges or charges, and nothing more" (*m*).

By the Divorce and Matrimonial Causes Act, 1857 (*n*), it was provided, that every woman who had obtained a judicial separation, should be considered as a *feme sole* with respect to property of every description which she might acquire, or which might come to or devolve upon her; and such property might be disposed of by her in all respects as a *feme sole*, and on her decease the same should, in case she should die intestate, go as the same would have gone if her husband had been then dead; and by the amending Act of the following year (*o*) these provisions were made applicable to property to which such wife had become or should become entitled as executrix, administratrix or trustee, since the sentence of separation or the commencement of desertion by the husband.

In 1870 it was enacted (*p*), that where any woman married after the 9th of August, 1870, should, during her marriage, become entitled to any personal property as next of kin of an intestate, such property should belong to the woman for her separate use.

Finally, it was enacted in 1882, that every woman who married after the 31st of December, 1882, should be entitled to hold as her separate property, and to dispose of as a *feme sole*, all personal property which should belong to her at the

(*m*) *Clark* v. *Burgh*, 2 Coll. 221.
(*n*) 20 & 21 Vict. c. 85, s. 25.
(*o*) 21 & 22 Vict. c. 108, s. 7.
(*p*) 33 & 34 Vict. c. 93, s. 7.

time of the marriage, or should be acquired by or devolve upon her after marriage (*q*); and that every woman married before that date should be entitled to hold as her separate property, and to dispose of as a *feme sole*, all personal estate, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, should accrue after the 31st of December, 1882 (*r*).

(*q*) 45 & 46 Vict. c. 75, s. 2. (*r*) Sect. 5.

CHAPTER V.

REALTY.

THE doctrine of conjugal unity did not apply so strongly to the wife's real property as to her personalty.

The effect of marriage was, at common law, to vest the seisin of the wife's realty in the husband, and he obtained the right to the occupation and to the rents and profits so long as the coverture lasted.

It appears, at a first glance, difficult to account for this discrepancy between the wife's personalty and the wife's realty; but the answer is, that originally the doctrine of conjugal unity in all probability applied equally to personalty and to realty.

Originally a grant of lands was construed as a grant to the grantee as long as he could hold them, that is, during his life and no longer (*a*), for feudal donations were not extended beyond the precise terms of the gift by any presumed intent, but were construed strictly (*b*), and on the death of the tenant the lands reverted to the lord. It was during this period that the doctrine of conjugal unity was introduced into the country, and marriage only gave the husband a right equal to that of his wife. Later on feuds became heritable, but it was only the lineal descendant and not the collaterals who were allowed to inherit, and inasmuch as the lineal descendant of the husband would, in nearly every case, be the lineal descendant of the wife, it would not have been so particularly advantageous to the husband to have the inheritance, especially as there was no right of alienation over the estate of inheritance. Whatever may have been the cause it is certain that, by the time of Glanvil, it was impossible for a husband

(*a*) Bracton, lib. 2, fo. 92, par. 6. (*b*) Wright's Tenures, 17, 152.

to alienate his wife's estate of inheritance: "Mariti mulierũ quarumcunque nihil de hereditate uxorũ suarũ donare possunt sine consensu heredum suorum, vel de jure ipsorum heredum aliquid remittere possunt, nisi in vita sua" (*c*).

It is considered that originally women, on account of their being unable to perform military duty, were unable to succeed to proper feuds; and that if a feud, by its original constitution, were descendible to females, it was an improper feud on account of that very fact (*d*). By the Salic law women were unable to succeed to estates, either lineally or collaterally. The earlier code says, "De terrâ verò Salicâ in mulierem nulla portio hæreditatis transit; sed hoc virilis sexus acquirit; hoc est, filii in hæreditate succedunt." The later code expresses it thus, "De terrâ autem Salicâ, nulla portio hæreditatis mulieri veniat sed ad virilem sexum tota hæreditas perveniat."

But later on women were allowed to succeed to feuds, and even the Salic law lost its force, except in the case of succession to the throne, which was not altered. In the dispute between Edward the 3rd and Philip of Valois there was no question as to whether females themselves could succeed to the throne; the dispute was, whether the male descendants of daughters could succeed. Edward the 3rd contended that they could, but the decision of the assembly held at Paris determined that they could not. This exclusion from the throne of France did not prevent females succeeding to other dignities. So also in England a woman could succeed to dignities. Thus, Ann Countess of Pembroke, Dorset, and Montgomery had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes held at Appleby, she sat on the bench with the judges.

In England females originally communicated their titles and dignities to their husbands, but this state of things did not last long. In 1580 one, Richard Bertie, claimed the barony of Willoughby in right of his wife Catherine, Duchess of Suffolk, he having had issue by her. A claim to the same

(*c*) Glanvil, vii. 3. (*d*) Craig, de Jure Feud.

dignity was also made by Peregrine Bertie, the son and heir of the Duchess of Suffolk, by Richard Bertie. Queen Elizabeth referred the matter to Lord Burghley and two commissioners. Numerous precedents were furnished in favour of the husband, clearly showing what was the old state of the law, and at first it was thought that the report of the commissioners would, on the strength of these precedents, be in his favour, but they finally reported in favour of the son, who was admitted to the dignity during the lifetime of the father (*e*).

Although by the common law a woman did not communicate her rank or titles to her husband, yet the freehold, or the right of possession, of all her lands of inheritance vested in him immediately upon the marriage, but the right of property still remained in the wife (*f*).

The husband took two species of interests in his wife's realty; marriage gave him the seisin for the duration of the coverture, and as soon as issue were born he obtained the life estate known as the estate by the courtesy of England. This latter interest will be treated of subsequently.

The value of the husband's interest in his wife's realty was greatly increased in 1540, it being enacted in that year (*g*) that he might make a binding lease of his wife's lands for twenty-one years, or three lives. The concurrence of the wife was, however, necessary, and the rent was reserved to the husband and wife, and *her* heirs, and was inalienable during the coverture without her consent. Previous to this statute, if a husband seised of lands in right of his wife had made a lease of them by indenture or deed poll, reserving rent, the wife was not bound by the lease after the husband's death if she showed her dissent, but if she accepted the rent which became due after her husband's death the lease thereby became absolute and unavoidable.

At common law, if the husband alienated his wife's land the alienation was a discontinuance, whether it were made by

(*e*) Coll. Proceed. on Claims of Barony, 1—23.

(*f*) 1 Inst. 351 a, 273 b.

(*g*) 32 Hen. 8, c. 28.

feoffment, fine, or recovery, and, after his death, the wife was put to her "*cui in vita*," to reinstate herself. If the husband's fine had been by proclamation, and the wife did not enter into her land within five years after the death of her husband, her entry was taken away, and her right for ever extinguished (*h*). But it was provided in 1540 (*i*) that no fine levied by the husband alone of lands, being the freehold and inheritance of the wife, should in anywise be or make a discontinuance, or be otherwise prejudiced to her or her heirs, but that the wife and her heirs should and might lawfully enter into the said lands according to their rights and titles therein. This Act was only applicable to the case of fines without proclamation, so that if the fine were made with proclamation the statute 4 Hen. 7, c. 24, applied, and the wife's right of entry was barred at the end of five years from the death of the husband.

If a married woman levied a fine of her own estate of inheritance without the concurrence of her husband she and her heirs were bound, for they were estopped from denying the fine; but the fine was void as against the husband, and he might enter either during the coverture to regain his freehold "*jure uxoris*," or after the wife's death, to regain his tenancy by the courtesy.

There is one instance of a married woman being allowed to levy a fine without her husband. This occurred in 1777. The husband had, in 1759, sold lands, and covenanted that he and his wife (when of age) should levy a fine. When the wife came of age she refused to join in it; but it was levied by the husband alone, who afterwards went abroad. The wife subsequently consented to levy it, but the husband was absent. It was said, upon motion to levy it, that it had been usual in such cases for the cursitor to make out a *præcipe* to the wife as a *feme sole;* but no example of it was produced. The Court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse* before the Lord

(*h*) 4 Hen. 7, c. 24.

(*i*) 32 Hen. 8, c. 28, s. 6.

Chief Justice then in Court (*k*). If the husband and wife joined in the fine to convey the wife's estate of inheritance, the conveyance was good if the woman were of full age, and she was bound by the fine as though she had been a *feme sole;* but it was the duty of the judge before whom the fine was levied not to receive the fine, unless upon examining her it appeared to be voluntary and free from constraint (*l*).

It was not necessary in all cases of levying fines to separately examine the wife; if the wife parted with nothing examination was unnecessary, but if she had to convey any interest, either as regards herself solely or jointly with her husband, then examination was necessary. Therefore, if A. levied a fine *come ceo* to a man and his wife, and they rendered to the conusor, the wife had to be examined; and so where she took an estate by the fine and paid rent (*m*). If, at the time of levying the fine, the wife was under age she might join with her husband in a writ of error to reverse it.

A married woman could be barred by a recovery as well as by a fine, for the *præcipe* in the recovery, similarly to the writ of covenant in the fine, brought her into Court, where examination by the judge destroyed the presumption of law that the woman was acting under the coercion of her husband (*n*). But if the wife, either alone or jointly with her husband, conveyed her lands by bargain and sale, by deed enrolled, she was not bound by the conveyance, for she could not be examined (*o*) by any Court without a writ, and there was no writ in this case.

If a husband disseised a person to the use of his wife, it did not make her guilty of the disseisin even if she had agreed to the disseisin during the coverture; for during the coverture she was not considered as having any will of her own; but her agreement after her husband's death made her

(*k*) *Moreau's case*, 2 Black. R. 1205.
(*l*) 2 Inst. 515.
(*m*) 2 Rolle, Abr. 17.
(*n*) 2 Rolle, Abr. 395.
(*o*) 2 Inst. 75.

a disseisoress (*p*). And the same thing applied if a third party disseised another to the use of a *feme covert*. But if the married woman actually entered and committed a disseisin, either with her husband or solely, she was a disseisoress, inasmuch as she gained a wrongful possession.

Where a husband who was seised of copyholds in right of his wife, made a lease for a longer period than the custom of the manor allowed; it was held, in 1589, that this caused a forfeiture of the wife's copyhold (*q*); but in 1625 it was held that in such a case the wife was not bound, but should on the death of her husband have her copyholds again notwithstanding the forfeiture (*r*).

It was provided by statute in 1722 (*s*), that married women entitled by descent or surrender to the use of a will, who had not been admitted, might be admitted tenants of their copyhold estates, either personally or by their guardians or attorneys; and, in case of neglect, that the lords of the manor of whom the lands were held might appoint guardians or attorneys for the purpose, and impose and levy the usual fines, and receive the same out of the rents of the estate, accounting for the surplus to the persons entitled, and that no neglect or refusal to be admitted, or pay the fines, should be a forfeiture of the copyholds. In 1806 it was decided that the provisions of this Act were confined to the cases therein expressed, namely, to the case of title by descent or surrender to the use of a will, and did not apply to a title under a deed (*t*).

If a man, having married a woman who was the owner of a customary estate in fee, took a grant of the freehold from the lord, upon which livery of seisin was afterwards given, it appears that the grant operated as an enfranchisement before the livery, and that the course of descent of the customary estate would not be thereby altered.

If a woman who was a guardian in socage married, and

(*p*) Rolle, Abr. 660.

(*q*) *Hedd* v. *Chalener*, 1 Cro. Eliz. 149.

(*r*) *Saverne* v. *Smith*, 4 Cro. Car. 1, 7.

(*s*) 9 Geo. 1, c. 29.

(*t*) *Lord Kensington* v. *Mansell*, 13 Ves. 240.

joined with her husband in making a lease of the ward's lands, she might avoid the lease after the death of the husband. For although the husband had absolute power during the coverture of the real and personal chattels of his wife, and the wardship of the body and the land in this case was only a chattel; yet the wife being possessed of it in right of the infant, and being accountable to the infant for the profits, could, on her husband's death, avoid it in right of the infant whose guardian she continued to be; and the fact of her having joined in the lease was immaterial, because at the time of joining she was under coverture.

In 1833 it was enacted by the Act for the Abolition of Fines and Recoveries (*u*), that, after the 31st of December, 1833, it should be lawful for a married woman, by deed, to dispose of lands of any tenure, except entailed lands, and to dispose of, release, surrender or extinguish any estate which she alone, or she and her husband in her right, might have in lands of any tenure, and also to release or extinguish any power which might be vested in, or limited or reserved to, her in regard to any lands of any tenure, as fully and effectually as she could do if she were a *feme sole*, save and except that no such disposition, release, surrender or extinguishment should be valid and effectual unless the husband concurred in the deed by which the same should be effected, nor unless the deed be acknowledged by her as thereinafter directed. But the Act did not extend to a married woman's copyholds in certain cases; nor did it apply to the execution of a power (*x*).

The deed of the married woman had to be produced and acknowledged by her as her act and deed before a judge of one of the superior Courts at Westminster, or a master in chancery, or before two perpetual commissioners or two special commissioners, to be respectively appointed as thereinafter provided (*y*); and the judge, master in chancery or commissioners, before he or they could receive the acknowledgment, had to examine the woman, apart from her hus-

(*u*) 3 & 4 Will. 4, c. 74. (*x*) Sect. 78. (*y*) Sect. 79.

band, so as to ascertain whether she freely and voluntarily consented to the deed (*z*).

The office of master in chancery was abolished in 1852 (*a*); in 1856 it was provided (*b*) that the acknowledgment of a married woman might be received by a judge of a county Court in the same way as by a judge of a superior Court, and by the Conveyancing Act of 1882 (*c*) the acknowledgment may be made before one instead of two commissioners.

Where a married woman was entitled to a fund raiseable out of real estate on the death of a tenant for life, it was held by Vice-Chancellor Knight Bruce, in 1851, that a deed executed during the lifetime of the tenant for life by her and her husband and the parties entitled to the estate, and acknowledged by her under the Fines and Recoveries Act, did not bar her right (*d*). But in 1855 it was decided, by Sir John Romilly, that although no assignment could be made of the reversionary interest of a married woman, so as to bind her, in the event of the death of her husband in her lifetime, and before it fell into possession; yet a perfect conveyance might be made by her and her husband, under the Fines and Recoveries Act, of a reversionary interest in the produce of real estate directed to be sold (*e*). The interest of a married woman in the proceeds of real estate devised by the will under which she took such an interest upon trust for sale, was held by Sir William Page Wood, V.-C., in 1853, to pass by her deed executed and acknowledged according to the provisions of the Fines and Recoveries Act, whether such interest were in possession or reversion, and whether the sale of the real estate was or was not made. The Vice-Chancellor remarked in his judgment, "In the case now before me there is a devise to trustees to sell the real estate of the testator, and out of the proceeds this lady, and the other children of the testator's nephew, are to be paid their respective shares. There is, therefore, a legal and an equitable interest created, and that equitable interest in the estate is not in the trustees,

(*z*) Sect. 80.
(*a*) 15 & 16 Vict. c. 80, s. 1.
(*b*) 19 & 20 Vict. c. 108, s. 73.
(*c*) 45 & 46 Vict. c. 39.
(*d*) *Hobby* v. *Allen*, 15 Jur. 835.
(*e*) *Tuer* v. *Turner*, 20 Beav. 560.

but in the several persons for whose benefit the sale is to be made. The lady has an equitable interest in her share, and the case appears to me to fall as distinctly as it can do within the words of the statute. If that be so, how can I refuse to give effect to the language of the statute; it is to be regretted that the learned judge who decided the case of *Hobby* v. *Allen* did not give his reasons for the judgment, as it would have been satisfactory to have known the exact grounds on which it proceeded" (*f*).

In the year 1845 married women were enabled by statute (*g*) to dispose of their contingent and other like interests, and also their rights of entry, by deed; but such disposition had to be made with the formalities required by the Fines and Recoveries Act.

In 1858, Sir William Page Wood, V.-C., held that a married woman could elect so as to affect her interest in real property, without a deed acknowledged under the Fines and Recoveries Act, and that where she had so elected, the Court could order a conveyance accordingly, the ground of such order being, that no married woman should avail herself of fraud (*h*).

After the passing of the Fines and Recoveries Act, it was considered doubtful whether a married woman could disclaim, although the general opinion was that she could; but the difficulty was settled in 1845, when it was provided by statute (*i*) that a married woman might disclaim by deed made in conformity with the Fines and Recoveries Act.

The old rule of law was, that an estate of freehold could only be disclaimed by matter of record (*k*); but, in 1819, it was held that a devisee in fee might by deed, without matter of record, disclaim the estate devised (*l*), and this decision was followed by the Court of Common Pleas in 1835 (*m*).

(*f*) *Briggs* v. *Chamberlaine*, 11 Hare, 69.

(*g*) 8 & 9 Vict. c. 106, s. 6.

(*h*) *Barrow* v. *Barrow*, 4 Kay & J. 409.

(*i*) 8 & 9 Vict. c. 106, s. 7.

(*k*) *Butler and Baker's case*, 3 Rep. 26.

(*l*) *Townson* v. *Tickell*, 3 Ba. & Ald. 31.

(*m*) *Begbie* v. *Crook*, 2 Bing. N. C. 70.

In a recent case, under the will of a testator who died in March, 1862, M., a married woman, was entitled in reversion expectant on the death of a tenant for life, to a share of the proceeds of real estate devised to trustees in trust for sale on that event. In August, 1862, in the lifetime of the tenant for life, M.'s husband executed a general assignment, under the Bankruptcy Act, 1861, of all his property to a trustee for the benefit of his creditors. In August, 1866, he was adjudged bankrupt, and in December following he obtained his discharge. The tenant for life died in January, 1869. By a deed executed in the following February, and duly acknowledged by M. under section 77 of the Fines and Recoveries Act, M. and her husband assigned all moneys which should become due to them, or either of them, under the testator's will to S., by way of mortgage. Shortly afterwards the trustees of the will sold the real estate, and ultimately paid M.'s share of the proceeds into Court under the Trustees Relief Act; and it was held by Mr. Justice Chitty, in February, 1883, that the husband was not precluded by the creditor's deed of 1862, or by his bankruptcy in 1866, from concurring with his wife in the mortgage of 1869, and accordingly that the mortgage was valid against the trustee of the creditor's deed, and the assignee in bankruptcy (*n*).

As before stated, the deed of the married woman made under the provisions of the Fines and Recoveries Act, had to be acknowledged by her, but an exception to this rule was made in 1841, in which year it was enacted (*o*), that where a married woman should be seised or possessed of or entitled to any estate or interest, manorial or otherwise, in land proposed to be conveyed for the purposes of the Act, affording facilities for the conveyance and endowment of sites for schools, she and her husband might convey the same for such purposes by deed, without acknowledgment.

In 1854, the question arose whether the conveyance of a married woman was good if the acknowledgment were made

(*n*) *Re Jakeman's Trusts*, 23 C. D. 344.

(*o*) 4 & 5 Vict. c. 38, s. 5.

before two commissioners, one of whom was an interested person. One of the commissioners, John Lord, was a mortgagee. Sir Frederick Pollock, in deciding the point said, "If the defect appeared on the face of the certificate itself, compared with the deed, as, for instance, if it appeared by that comparison that the party to whom the conveyance was made was one of the commissioners, it may be that the objection as to the invalidity of the certificate might be taken on a trial at law, where the title was in question" (*p*). But the difficulty was settled, in 1854, by the Act entitled "An Act to remove doubts concerning the due acknowledgment of deeds by married women in certain cases" (*q*), by which it was provided, that an acknowledgment of a deed should not be impeachable by reason only of the person before whom the same was taken being interested; but that the Court of Common Pleas might make rules for preventing commissioners who were interested from taking acknowledgments.

In *Ex parte Jane Menhennet* (*r*), decided in 1869, one of the commissioners who had taken the acknowledgment of a deed by a married woman, being interested in the transaction, took no part in the examination. Both the commissioners signed the certificate required by the Fines and Recoveries Act, but in consequence of the death of the commissioner, who was not interested, the requisite affidavit could not be made, and the Court refused to allow the certificate of acknowledgment to be filed. Sir William Bovill remarked, "The rule of Hilary Term, 4 Will. 4, construed with the Act of 17 & 18 Vict. c. 75, must not be considered as approving or confirming the practice of taking acknowledgments by an interested commissioner. Except in cases of reasonable necessity, at all events, both of the commissioners ought to be disinterested, and the acknowledgment should be taken before both."

Neither the husband, nor his solicitor, nor any person con-

(*p*) *Banks* v. *Ollerton*, 10 Ex. 168.

(*q*) 17 & 18 Vict. c. 75.

(*r*) L. R., 5 C. P. 16.

nected with him, ought to be present at the examination of the wife (*s*).

In 1843 Lord Chief Justice Tindal directed the officers to file an acknowledgment of a married woman, it appearing by affidavit, and also upon the certificate, that she was deaf and dumb, the nature of the transaction having been duly explained to her by signs, and that she had, in like manner, signified her assent (*t*).

A woman, being mortgagee in fee before her marriage, made an equitable mortgage by deposit of the title deeds; she then married. In a suit for a foreclosure of the mortgage, or a sale, it was ordered that the estate should be sold, and that all proper parties should join in the conveyance as the master should direct. The estate was accordingly sold, and the purchaser, having paid his purchase-money into Court, was let into possession. The married woman refused to execute the deed of conveyance, and Vice-Chancellor Wigram in 1846 ordered her to execute the conveyance pursuant to the decree, and acknowledge it before a master or commissioner, but upon appeal Lord Cottenham, C., reversed this order, and, after some hesitation, came to the conclusion that the Court had no authority to make such an order as this against a married woman (*u*).

Where a ward of Court married without consent, and after she attained her majority executed, by the direction of the Court, a settlement of real estate to which she was equitably entitled, but did not acknowledge the deed according to the Fines and Recoveries Act, it was held by the Court of Appeal in 1855 that her heir was not bound by the conveyance (*x*).

Where real estate of an intestate was sold under a decree in an administration, and the heiress at law was a *feme covert* who refused to acknowledge the conveyance to the purchaser, Vice-Chancellor Knight Bruce in 1847 referred it to the

(*s*) *Re Bendyshe*, 3 Jur., N. S. 727.

(*t*) *Re Sarah Harper*, 6 Man. & G. 732.

(*u*) *Jordan* v. *Jones*, 2 Phil. C. C. 170.

(*x*) *Field* v. *Moore*, *Field* v. *Brown*, 7 De G., M. & G. 691.

master to inquire whether the conveyance was a fit and proper one, and, if not, to approve of a fit and proper conveyance, intimating that the purchaser was entitled to an order for the execution of a proper conveyance, according to the provisions of the statute 1 Will. 4, c. 60 (*y*).

In 1842 Lord Chief Justice Tindal decided, that the two commissioners who took the acknowledgment of a married woman must both be appointed for the county in which the acknowledgment was taken (*z*); but in 1876 Sir George Jessel, M. R., held that the commissioners need not be appointed for the county in which the acknowledgment was taken (*a*).

The commissioners had a lien on the instruments in their joint possession for the fees due in respect of the discharge of their duty as commissioners, and if a deed were in the possession of one only he might, if authorized by the other, detain the deed for that other's lien (*b*).

Where a married woman acknowledged a mortgage deed before a judge who signed a certificate as required by the Fines and Recoveries Act, but the certificate was lost before it was lodged with the proper officer of the Court for the purpose of being filed, it was held, in 1867, that, whether a fresh certificate, if given by the judge, would be valid or not, the Court had no power to authorize him to give one (*c*).

A married woman, immediately after marriage, and in consideration thereof, and of her husband undertaking the management of lands and tenements of which she was seised in fee, and of his paying off incumbrances, and defraying the expense of managing and keeping the premises in repair, verbally agreed to convey the lands and tenements to him, and to settle them upon him absolutely, and to do all such acts as might be legally necessary for effectuating such conveyance and settlement. The husband performed his part of

(*y*) *Billing* v. *Webb*, 1 De G. & S. 716.

(*z*) *Webster* v. *Carline*, 4 Man. & G. 27.

(*a*) *Blackmur* v. *Blackmur*, 3 C. D. 633.

(*b*) *Ex parte Grove*, 3 Bing. N. C. 304.

(*c*) *Re a Married Woman*, L. R., 2 C. P. 510.

the agreement, but the wife died without having executed or acknowledged a deed, and it was held by Justices Manisty and Watkin Williams in 1882 that the contract could not be set up as an equitable defence to a claim by her heir at law to recover the land (*d*).

The before-mentioned provisions of the Fines and Recoveries Act were of a substitutional character; they merely enabled a married woman to do by deed, duly acknowledged, what she could previously have done only by means of the cumbrous machinery of a fine or recovery. But, in addition, the Act contained provisions of a remedial character, enabling a married woman, in certain cases, to dispose of her interest without the concurrence of her husband.

It was enacted by the 91st section of the Act that if a husband should, in consequence of being a lunatic, idiot, or of unsound mind, and whether he should have been found such by inquisition or not, or should from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of Court roll, or if his residence should not be known, or he should be in prison, or should be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it should be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court should seem meet, to dispense with the concurrence of the husband in any case in which his concurrence was required by that Act, or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, should be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her should (but without prejudice to the rights of the husband as then existing, independently of the Act) be as good

(*d*) *Williams* v. *Walker*, 9 Q. B. D. 576.

and valid as they would have been if the husband had concurred.

There have been numerous decisions on this section of the Act.

In 1846 it was decided, upon a motion on the part of a married woman under this section to convey her interest in property without the concurrence of her husband, on the ground that he was of unsound mind, that the affidavit must show in distinct terms, or by necessary inference, that the husband was a lunatic at the time of the application (*e*).

Where a married woman, who was heiress of a surviving trustee, lived apart from her husband, who was in a very nervous and excitable state, so as to render it difficult, if not impossible, to procure the execution by him of any legal instrument, Lord Chief Justice Tindal refused to dispense with the husband's concurrence in the conveyance of the property until an application had been made to him to concur; although neither he nor his wife had any interest in the property to be conveyed (*f*).

In 1834 upon an affidavit of a married woman that her husband had absconded in 1831, after committing an act of bankruptcy, and had never been heard of since, but was believed to be in America, leave was granted for her to pass her contingent life interest in freehold property (*g*); and in 1839 the Lord Chief Justice authorized a *feme covert* to convey her copyhold property, her husband having resided abroad for more than twenty years with another woman (*h*).

A husband and wife were married in 1829, but lived together only seventeen weeks; the husband then went away, and although the wife had made frequent inquiries for him he could not be found. Upon the wife applying to the Court in 1838 leave was granted for her to dispose of her lands without the concurrence of her husband (*i*). But Chief Justice Wilde and Justice Maule, in 1847, refused to dis-

(*e*) *Re Jane Turner*, 3 C. B. 166.

(*f*) *H. Murfin, wife of* ——, *Murfin* to ——, 4 Man. & G. 635.

(*g*) *Ex parte Mary Gill*, 1 Bing. N. C. 168.

(*h*) *Ex parte Ann Shirley*, 5 Bing. N. C. 226.

(*i*) *Anon.*, 2 Jur. 945.

pense with the concurrence of a husband, upon an affidavit merely stating that he entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand, and she believed it was his intention never to return (*k*). And in 1849 Chief Justice Wilde refused to grant a rule to enable a married woman to execute a conveyance without her husband's concurrence, upon a mere statement that the husband, a seaman, had gone abroad, and had not been heard of for some years, and that the wife had been informed that he was dead (*l*).

In the case of the husband being abroad, the Court would not make an order for the execution by a married woman without the concurrence of her husband, unless it appeared that the husband had absented himself under such circumstances that it might be inferred that he had no intention of returning; nor where the husband was in correspondence with the wife and was remitting money for her support (*m*).

By a marriage settlement made in 1844, certain property of the intended wife was conveyed to trustees, upon trust to permit the husband to receive the rents and profits during the coverture, or until the wife should, by writing under her hand, otherwise direct or appoint, and, from and after such direction or appointment, upon trust for the separate use of the wife. The deed also contained a power of sale to be exercised "at the request and by the direction (in writing) of the husband and wife." Down to the year 1851 the rents and profits were received by the husband; but, in March of that year the wife, pursuant to the provisions for that purpose in the settlement, required the trustees to receive them, and to pay and apply them to her sole and separate use. In December, 1852, the husband went to Australia. No tidings of him had reached the wife since December, 1857. The affidavit of the wife alleged her belief that he had no intention ever to return to this country. No application had been

(*k*) *Ex parte Gilmore*, 3 C. B. 967.

(*l*) *Ex parte Elizabeth Taylor*, 7 C. B. 1.

(*m*) *Re Squires*, 17 C. B. 176.

made to the husband for his concurrence in the conveyance; and Chief Justice Cockburn and Justice Williams, in 1858, held that this was not a case for an order to dispense with the husband's concurrence in a deed for the conveyance of the property (*n*).

However, in 1855, the Court made an order upon an affidavit stating that the husband about two months before, having fallen into distress, left England for Australia, with the intention of never returning, and that he had ever since been living separate and apart from his wife (*o*).

The Court dispensed with the concurrence of the husband, upon an affidavit of the wife that she and her husband had been living apart for twenty-four years, and that in 1833 her husband was found by inquisition to be, and to have been since 1825, a person of unsound mind (*p*). This was decided on the 15th of April, 1834, and is noteworthy as being the first application made to the Court under the 91st section of the Fines and Recoveries Act. Another application was made to the Court on the 1st of May in the same year, and the husband's concurrence was dispensed with, on an affidavit of the wife, stating that she was married to him in 1816, that he left her in 1820; that she had never heard of nor received any information respecting him since, and that his residence was then unknown to her; that she was entitled in her own right to the entirety of certain copyhold premises, which she had been compelled to mortgage; and that if the application were not granted, she would be liable to incur a forfeiture (*q*).

An order having been made enabling a married woman without the concurrence of her husband to dispose of her reversionary property, to which she was entitled under the will of her brother; upon the usual affidavit of the wife that she was living apart from her husband by mutual consent, Chief Justice Erle, Justice Willes, and Justice Keating, in 1865, refused to rescind the order, after it had been acted upon,

(*n*) *Re Mary Eden*, 5 C. B., N. S. 232.

(*o*) *Re Kelsey*, 16 C. B. 197.

(*p*) *Ex parte Thomas*, 4 Moore & Scott, 331.

(*q*) *Ex parte Shuttleworth*, 4 Moore & Scott, 332, n. (*b*).

and rights of third parties had intervened, upon the application of the husband, who swore that, though he generally resided apart from his wife (upon an allowance made to him out of her separate estate), he occasionally visited and slept with her (*r*).

In 1865 an application was made to the Court for liberty for a married woman to convey property without her husband's concurrence, on the ground that he had several years ago deserted her, and his residence was unknown. Part only of the property having been agreed to be sold, counsel asked for an order embracing the remaining part when it should be sold; but the Court refused, Chief Justice Erle being of opinion that it would be highly inconvenient to make an order otherwise than with reference to a contemplated purchase (*s*).

Where a husband and wife were living apart, and the wife being devisee under a will of real property on trust for sale, the husband refused to concur in a conveyance of such property upon a sale under the trusts of the will, unless he received a sum of money for doing so, Baron Huddleston and Justice North, in 1883, granted an order dispensing with the concurrence of the husband, although it was admitted by the affidavit that the husband had, since he had left his wife, to a slight extent contributed to her support (*t*).

Where the husband was a minor, and therefore unable to concur in his wife's conveyance of her separate estate, the Court dispensed with his concurrence; Chief Justice Cockburn holding that the case came within the provisions of the Act (*u*).

In 1855 Chief Justice Jervis granted an order to dispense with the concurrence of the husband in a conveyance by the wife of her property, upon an affidavit showing that he had absconded, and had not been heard of since the year 1837, although it also appeared that she had in the meantime

(*r*) *Re Alice Rogers*, L. R., 1 C. P. 47.

(*s*) *Re Mary Graham*, 19 C. B., N. S. 370.

(*t*) *Re Caine*, 10 Q. B. D. 284.

(*u*) *Re Eliza Haigh*, 2 C. B., N. S. 198.

married again. But the Chief Justice remarked that the order was not to affect the purchaser's right to require the concurrence of the second husband (*x*). The same judge dispensed with the concurrence of the husband (who was living separate from his wife) in a conveyance of property in which the wife had a separate interest under the will of her deceased father, where the husband had refused to execute the deed (*y*). And the Court also dispensed with the concurrence of the husband where he had refused to concur unless part of the purchase-money were paid to him (*z*).

In 1865 Mr. O'Malley, Q.C., moved for a rule to enable a married woman by deed or surrender to dispose of certain property to which she was entitled under the will of her deceased father, without the concurrence of her husband, on the ground that he was living separate and apart from her by a decree of judicial separation pronounced by the Court for Divorce and Matrimonial Causes on the 8th of June, 1864. The affidavit in support of the application stated that no alimony had been awarded to the lady, that her husband did not contribute towards her support, and that he had refused to concur. The Court granted the rule, being of opinion that all the conditions necessary to such an application had been complied with (*a*).

In the case of *Taylor* v. *Meads* (*b*) it was decided that a married woman could dispose of the equitable interest in her separate property without her husband's concurrence.

In 1840 Chief Justice Tindal and Justice Bosanquet held that, in order to enable a married woman to make a conveyance of her property, there must be an affidavit from her showing her concurrence, and that if the husband did not join in the application his non-concurrence had to be accounted for by affidavit (*c*); and, in 1841, Chief Justice Tindal again refused to dispense with the wife's affidavit (*d*).

(*x*) *Ex parte Yarnall*, 17 C.B.189.
(*y*) *Re Perrin*, 14 C. B. 420.
(*z*) *Re Woodcock*, 1 M. & G., N. S. 437.
(*a*) *Ex parte Susannah Andrews*, 19 C. B., N. S. 371.
(*b*) 13 W. R. 394.
(*c*) *Re Mary Williams*, 1 Man. & G. 881.
(*d*) *Ex parte Bruce*, 9 Dowl. 840.

In 1856 the Court refused to grant a rule to enable a married woman to execute a conveyance without the concurrence of her husband, upon an affidavit merely stating that the parties were living apart by mutual consent, but required an affidavit showing that an application had been made to the husband to execute the deed, and that he had refused to do so (*d*).

In 1862 Chief Justice Erle refused to permit a married woman to execute a conveyance without her husband's concurrence upon her mere affidavit that she had left her husband in consequence of his violence, and was living apart from him (*e*). And in another case the same judge, in addition to an affidavit that the parties were living apart by mutual consent, and that the husband had been applied to, but had refused to execute the conveyance, required an affidavit negativing the wife's receipt of any allowance from her husband (*f*).

In 1844 it was decided that the affidavit of a married woman was sufficient if sworn (where she was residing abroad) before an officer whom the certificate of a notary public certified to be a person empowered by law to take affidavits (*g*).

Where the wife was described in her affidavit as a "widow," the Court ordered the word "widow" to be struck out, and the affidavit re-sworn (*h*); and where she was described as a "wife or widow," the Court refused to receive the affidavit (*i*).

The form of the rule dispensing with the concurrence of the husband was laid down by the Court in 1843 in the case of *Ex parte Ann Tanner Duffill* (*k*). It was drawn up in the following words:—"It is ordered that the said Ann Tanner

(*d*) *Ex parte Anne Trenery*, 1 C. B., N. S. 187.

(*e*) *Re Sarah Price*, 13 C. B., N. S. 286.

(*f*) *Ex parte Mackarinah Fish*, 9 C. B., N. S. 715.

(*g*) *Re Schiff*, 1 Dowl. & L. 911.

(*h*) *Re Mary Noy*, 7 Scott, N. R. 434.

(*i*) *Re Anderson*, 2 C. B., N. S. 811.

(*k*) 5 Man. & Gr. 378.

Duffill be at liberty, by deed or surrender, to dispose of, release, surrender, or extinguish all her estate and interest of and in the hereditament and premises in the said affidavit mentioned to such person or persons as she may think fit without the concurrence of her said husband, it appearing to the Court by the said affidavit that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce."

It was provided by statute in 1857 that if a wife were judicially separated from her husband she should, from the date of the sentence, and whilst the separation should continue, be considered as a *feme sole* with respect to property of every description which she might acquire, or which might come to or devolve upon her, and such property might be disposed of by her, in all respects, as a *feme sole;* and on her decease the same should, in case she should die intestate, go as the same would have gone if her husband had been then dead (*l*). By the Amendment Act of the following year (*m*), every woman deserted by her husband was enabled, at any time after such desertion, to apply to a judge ordinary for an order to protect any property she might have acquired, or might acquire, by her own lawful industry, and any property she might have become possessed of, or might become possessed of, after such desertion, against her husband and his creditors, and any person claiming under him; and the judge ordinary could exercise, in respect of every such application, all the powers conferred upon the Court for Divorce and Matrimonial Causes by the 21st section of the Divorce and Matrimonial Causes Act, 1857 (*n*).

It was enacted by the Married Women's Property Act of 1870 (*o*) that, where any freehold, copyhold, or customaryhold property should descend upon any woman married after the passing of the Act, as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same,

(*l*) 20 & 21 Vict. c. 85.
(*m*) 21 & 22 Vict. c. 108.
(*n*) 20 & 21 Vict. c. 85.
(*o*) 33 & 34 Vict. c. 93, s. 8.

belong to such woman for her separate use, and her receipts alone should be a good discharge for the same.

It has been a question whether this provision applied solely to rents and profits, or whether it applied also to the *corpus*. If the term "rents and profits" exclude the fee, the land would, on the death of the wife, have descended to her heir free from her debts, but subject to her husband's courtesy; but, on the other hand, if they included the fee, she could dispose of it by deed or will, and so defeat her husband's courtesy, but in that case the land would be liable for her debts; if, on the other hand, she did not dispose of the fee, the land would descend to her heir, and the husband would have his courtesy (*p*). The question whether these words, "rents and profits," included the *corpus* was raised by the late Sir George Jessel, M.R., in the case of *King* v. *Voss*, in 1880 (*q*). His lordship observed:—"That there might be a question whether the provisions of the 8th section—that the 'rents and profits' of property to which a married woman married after the Act was entitled as heiress should belong to her for her separate use—did not apply to the *corpus*, as the rents and profits were not limited to those arising during her life."

The Settled Land Act of 1882 (*r*) provided that where a married woman, who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the provisions of the Act, was entitled for her separate use, or was entitled under any statute passed or to be passed for her separate property, or as a *feme sole*, then she, without her husband, should have the powers of a tenant for life under that Act, and that where she was entitled otherwise than as aforesaid, then she and her husband together should have the powers of a tenant for life under that Act.

Such, then, was the state of the law relating to a married woman's real estate down to the end of the year 1882, after

(*p*) *Cooper* v. *Macdonald*, 7 C. D. 288.

(*q*) 13 C. D. 504.

(*r*) 45 & 46 Vict. c. 38, s. 61.

which the Married Women's Property Act of that year came into operation (*s*).

By that Act a married woman was made capable of acquiring, holding, and disposing by will or otherwise, of any real property as her separate property, as if she were a *feme sole*, without the intervention of any trustee (*t*). By the 2nd section of the Act, every woman who marries after the commencement of the Act is to be entitled to have and to hold, as her separate property, and to dispose of all real property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage; and by the 5th section every woman married before the commencement of the Act shall be entitled to have and to hold, and to dispose of as her separate property, all real property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of the Act. These provisions practically abrogate both Malins' Act and the Fines and Recoveries Act, with regard to the property of women married after the commencement of the Act, and with regard to the property of women married before the commencement of the Act, the title to which accrues after the commencement of the Act. These Acts are not repealed and still apply to the property of women married before the 1st of January, 1883, and the title to which accrued before that date. The title to property accrues when the instrument creating the estate comes into operation.

It may be a question whether the Married Women's Property Act of 1882, will enable married women to qualify themselves for municipal rights. It was provided by statute in 1869 (*u*) that, in the Municipal Corporation Acts, words importing the masculine gender should include females for all purposes connected with the right to vote at the election of councillors, auditors and assessors; but the Court of Queen's Bench, in 1872, decided (*x*) that this provision

(*s*) 45 & 46 Vict. c. 75.
(*t*) Sect. 1.
(*u*) 32 & 33 Vict. c. 55, s. 9.
(*x*) *The Queen* v. *Harrald*, L. R., 7 Q. B. 361.

had reference only to the disability of women by reason of sex, and had no reference to the disability of women by reason of the status of coverture; that the Married Women's Property Act of 1870 had no reference to the political disabilities of married women, and therefore that a married woman, though qualified by occupation and payment of rates, and put on the burgess list, cannot vote at the election of town councillors. Sir Alexander Cockburn, C. J., in his decision, remarked, "By the common law, a married woman's status was so entirely merged in that of her husband, that she was incapable of exercising almost all public functions. It was thought to be a hardship, that when women bore their share of the public burthens, in respect of the occupation of property, they should not also share the rights to the municipal franchise and be represented; and it was thought that spinsters and unmarried women ought to be allowed to exercise these rights. The Act 32 & 33 Vict. c. 55 accordingly gave effect to these views, and enacted whenever men were entitled to vote, women, being in the same situation, should thereafter be entitled; but this only referred to women possessed of the necessary qualification in respect of property, and the payment of rates, and I cannot believe that it was intended to alter the status of married women. It seems quite clear that this statute had not married women in its contemplation. Nor can it be supposed that the subsequent statute, by which the status of married women with regard to the power to hold property, has been recognised and established, and which was passed *alio intuitu*, has, by a side wind, given them political or municipal rights;" and Justice Mellor added, "Sect. 9 of 32 & 33 Vict. c. 55 only removes the disqualification by reason of sex, and leaves untouched the disqualification by reason of status. So the Married Women's Property Acts as to this leave the status of a married woman untouched."

Now these remarks cannot apply to the property of married women coming within the operation of the new Act, and upon the above reasoning, it would appear that married

women will, under this Act, be enabled to qualify themselves for public offices for which a ratepaying qualification is necessary. A married woman, living apart from her husband, will for the future be enabled to take a house in her own name, and will be liable for the rent, rates, and taxes; and even if she is living with her husband in a house which is her separate property, or in a house for which she pays the rent, it would appear that she must be considered as the legal occupier, and, as such, entitled to vote in all elections in which women have hitherto taken part.

CHAPTER VI.

EQUITY OF REDEMPTION AND EXONERATION.

In the case of a mortgage of the wife's estates by her and her husband, the general rule was that the equity of redemption remained in the wife and her heirs, and was not transferred to the husband; and the wife was not excluded unless it was clear that a change of the property from the wife to the husband was intended. Where a mortgage was made of the wife's estate, and the equity of redemption was reserved to the husband and his heirs, it was held that there was a resulting trust in favour of the wife and her heirs (*a*).

A husband, having two mortgages on his estate, devised it to his wife, and died. The wife, having married again, joined her second husband in another mortgage of the estate, consolidating the two former mortgages into one at a different rate of interest, reserving the equity of redemption to the husband and his heirs, without any recital or special circumstances to show that it was the intention of the parties to make a new settlement of the estate. The second husband, after the death of the wife, dealt with the property as his own, disposed of part for valuable consideration, and died. In 1818 a claim by the heir-at-law of the wife against the purchaser, representatives of the husband and the mortgagee, to redeem, was allowed by the Court of Appeal; the rule being that, where husband and wife mortgaged the wife's estate, and the equity of redemption was reserved to the husband and his heirs, without recital or special circumstances to show the intention to make a new settlement of the estate, the husband had the equity of redemption, as he before had the legal estate, only "*jure uxoris*" (*b*).

(*a*) *Jackson* v. *Innes*, 1 Bli. 115. (*b*) *Ruscombe* v. *Hare*, 6 Dow. 1.

The first case in which the principle of the wife's equity of redemption was established occurred in 1683 (*c*). A wife had a jointure in some houses in London which were burnt down in the Great Fire; she and her husband borrowed 1,500*l.* to build upon the ground, and levied a fine *sur concess* for ninety-nine years, if the wife should live so long; and a deed was made between the conusee and the husband, wherein the husband covenanted to repay the mortgage money with interest; the equity of redemption was reserved to the husband and his heirs, but the wife was not a party to the deed; the husband expended a large sum of money in building on the land, and then died. Lord Nottingham, C., decreed that the equity of redemption belonged to the wife and not to the heir of the husband, and upon demurrer the Lord Keeper was of the same opinion, for the wife was no party to the deed of redemise by which the redemption was limited to the husband, and the wife being a jointress, and having granted a term of years only out of her estate for life, a reversion remained with her which naturally attracted the redemption; and the Lord Keeper remarked, that if the cause had come originally before him and there had been assets sufficient, the husband having covenanted to pay this money, he would have decreed it clear to the wife; and that it was as little as a husband could reasonably do to rebuild the houses and put his wife's jointure in as good a plight as it was before.

In *Rowell* v. *Whalley* (*d*), a wife joined with her husband in a mortgage of her lands, by a deed containing a proviso and declaration that if the husband and wife, or either of them or their heirs, executors, administrators, or assigns, paid to the mortgagee, his executors, administrators, or assigns, the sum borrowed, the fine to be levied according to the covenant contained in the deed should inure to the husband and wife, and the longest liver of them, with remainder to the right heirs of the husband for ever. A fine was afterwards levied, according to the agreement among the

(*c*) *Brend* v. *Brend*, 1 Vern. 213.

(*d*) 1 Chan. Rep. 116.

parties; and after the death of the husband the wife filed a bill to redeem. It was held that the subsequent declaration and limitation, having no connection with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife, and was a distinct settlement.

The next case on this point was decided in 1702. A wife joined with her husband in a mortgage of her own inheritance, in order to buy him a place, and he covenanted to pay the money. Later on the husband, in accordance with his covenant, paid the money, and took an assignment of the mortgage in trust for himself. He then devised the mortgage, which was a mortgage for a term of years, for the benefit of his younger children. But it was held by the House of Lords, partly reversing the decision of Lord Keeper Wright, that the eldest son, as heir of the wife, was entitled to have the term assigned as he should direct, discharged from all demands of the younger children (*e*).

The next case was decided by Sir Thomas Sewell, M. R., in 1770. A tenant in tail and his wife joined in a mortgage of the husband's estate by lease and release and fine. The equity of redemption was reserved to the husband and wife and their heirs, but there was a declaration in the deed that, after payment of the money lent on the mortgage, the fine should inure to the husband and his heirs. On the death of the husband, the Master of the Rolls held that the husband was solely entitled to the estate, and that the wife had only the power of redemption to secure her dower.

The before-mentioned decisions were commented upon by Lord Redesdale in the case of *Jackson* v. *Innes* (*f*) in 1819, in which he summed up the law in the following words:—"It must be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife or the estate of the hus-

(*e*) *Huntingdon* v. *Huntingdon*, 2 Bro. P. C. 1.

(*f*) 1 Bligh, 104.

band, if the wife joins in the conveyance, either because the estate belongs to her or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of an ambiguity, that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case."

A husband and wife in 1760 mortgaged the wife's freeholds for 1,000 years, reserving the power to redeem to themselves, or either of themselves, and covenanted to levy a fine to the mortgagee for the term, and subject thereto to the husband in fee. They also surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs. The husband afterwards released his equity of redemption as to both estates to the mortgagee in fee. The mortgagee entered into possession, and the husband afterwards died. Sir John Leach, V.-C., held, in 1825, that the wife was entitled to redeem the copyholds, but not the freeholds. "This case," said the Vice-Chancellor, "is not distinguishable in principle from *Innes* v. *Jackson*. The limitation of the uses of the fine to the husband and his heirs has no connection with the purpose of mortgage or the proviso for redemption, but is altogether a new settlement, which defeats the heir of the wife" (*g*).

A married woman being entitled for life, in the event of surviving her husband, to a rent-charge, joined with him in executing a mortgage of the estates upon which it was charged, and by the mortgage deed absolutely released and extinguished her rent-charge. A portion of the estates was reconveyed by the mortgagees to the husband released from the mortgage, and he afterwards re-mortgaged the same to other mortgagees, who, under a power, entered into a contract for sale. The title being objected to, on the ground that the rent-charge was still subsisting, the vendors produced parol

(*g*) *Reeves* v. *Hicks*, 2 S. & S. 403.

evidence that the former mortgagees had stipulated with the solicitor of the mortgagor and his wife for the absolute release of the rent-charge. But Sir John Wickens, V.-C., held, in 1871, that where a wife joined in a mortgage deed, her equity of redemption was not released if there were no express contract on her part to do so, and that, at any rate, the title was too doubtful to be forced upon the purchasers (*h*).

When the wife's estates were mortgaged for the purposes of her husband's debts she also had what is termed her equity of exoneration—that is, she had, in equity, the right of having her estates exonerated out of her husband's assets, on the ground that when mortgaging her property for the purposes of paying her husband's debts she was supposed to stand in the position of a surety. Lord Hardwicke, C., thus states the law in 1749:—"It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband. After the husband's death she is entitled to have her real estate exonerated out of the personal and real assets of the husband, the Court considering her estate only as a surety for his debts; and none of his creditors have a right to stand in place of the mortgagee, to come round on the wife's estate" (*i*). And the same Lord Chancellor, in another case, remarked (*k*):—"Suppose a husband has a mortgage upon his estate, and his wife joins with him in charging her own, if she survives him, though her estate is liable to the mortgagee, yet in this Court her estate shall be looked upon only as a pledge, and she is entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate."

"The principle is well known, and old as the Court itself," said Lord Camden, in 1767, "that when husband and wife raise money out of the wife's estates, with the reversion to one or to the other, this Court inquires into the uses, considers them as two persons, and, if I may use the expression, dissolves the marriage, *quoad* the transaction. Though the

(*h*) *Re Breton's Trust Estates*, L. R., 12 Eq. 553.

(*i*) *Robinson* v. *Gee*, 1 Ves. sen. 251.

(*k*) *Parteriche* v. *Powlet*, 2 Atk. 383.

husband covenants to pay the money, and gives bond, yet the application determines who is the principal, who is the surety. This is the case of principal and surety at common law, the principal is first obliged to pay, and the surety only in default; in equity the surety comes in aid of the principal debtor" (*l*).

If the husband became bankrupt the wife was entitled, after she had paid the debt, to come against her husband's estate in bankruptcy as a creditor, and receive a dividend thereout with the other creditors (*m*).

If, however, the wife's estate was mortgaged for the benefit of herself, she was not entitled to exoneration (*n*).

A husband and wife having a joint power of appointment over an estate the ultimate limitations of which, in default of appointment, were to the use of the husband and wife in moieties in fee, executed the power by way of mortgage to secure the husband's debt, and it was held by Lord Westbury, C., in 1863, affirming the decision of Sir John Romilly, M. R., that this was no mortgage of the wife's estate, and, consequently, that she was not entitled to have her moiety exonerated out of the estate of the husband (*o*).

A wife, married before the Dower Act, joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate to secure his debt. By the mortgage deed the equity of redemption was reserved to the husband. And it was held by the Court of Appeal, in 1877, reversing the decision of Vice-Chancellor Bacon, that the wife's right to dower was extinguished in equity as well as at law, and that she had no right to redeem the estate; and also that as she had pledged no estate recognized by a Court of Equity, and had undertaken no personal liability on behalf of her husband, she had no right, in the character of a surety for his debt, to have the value of her dower made

(*l*) *Kinnoul* v. *Money*, 3 Swan. 217, n.

(*m*) Remarks of Lord Westbury in *Gleaves* v. *Paine*, 1 De G., J. & S. 96.

(*n*) *Kinnoul* v. *Money*, 3 Swan. 202, n.

(*o*) *Scholefield* v. *Lockwood*, 33 L. J. (N. S.) Eq. 106.

good, after his death, out of the surplus proceeds of sale of the property which had been, during his life, sold by the mortgagee under a power of sale contained in the mortgage deed (*p*).

As before stated, in the case of the husband's bankruptcy, the wife's equity of exoneration was to come against her husband's estate as a creditor, and receive a dividend *pari passu* with the other creditors (*q*); but by the 3rd section of the Married Women's Property Act of 1882, any money or other estate of a wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, is to be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. For the future, therefore, her claim will be postponed to the claims of the other creditors in the case of her husband's bankruptcy. However, if the wife's property be vested in trustees, there seems no reason why they should not be allowed to prove *pari passu* with the other creditors, unless the property had been conveyed by the wife to the trustees at the same time as the mortgage, in which case the transaction would in all probability be considered a fraud.

As, by the Act of 1882, a married woman is enabled to mortgage her property without the concurrence of her husband, the difficulties in such cases with regard to her equity of redemption and equity of exoneration will not for the future arise; but if she should mortgage her separate property for the debt of her husband, it would appear that she will be entitled to her equity of exoneration as before the Act, except in the case of her husband's bankruptcy, where, as before stated, she will be postponed to his other creditors.

(*p*) *Dawson* v. *Bank of Whitehaven*, 4 C. D. 639; 6 C. D. 218.

(*q*) Remarks of Lord Westbury in *Gleaves* v. *Paine*, 1 De G., J. & S. 87.

CHAPTER VII.

DOWER.

By the civil law dower was the portion brought by the wife to her husband on marriage, either in land or money. The *naturale dominium* belonged to the wife, and the *dominium civile* to the husband; the husband having only the *usufruct* during his life in immoveables, and being unable to alienate them. Moveables he could alienate, but was bound to restore the value; for upon the dissolution of the marriage by the death of the husband or divorce, the moveables reverted to the wife.

Donations *inter sponsam* and *sponsam propter nuptias* commenced in the time of Constantine, and were made before marriage; but in the time of Justinian they were good if made after marriage, and were gifts from the husband to the wife, which, upon dissolution of marriage, reverted to the husband.

The feudal rule of dower was "Non uxor marito, sed uxori maritus affert." The reason of this was that the husband and the eldest son lived a military life, while the wife and the younger sons looked after and tilled the land, and found provisions for the army. The wife having the third part of the labour, had also the third part of the feud for the maintenance of herself and her younger children during her life.

Dower was of five kinds, namely,—1. At common law; 2. By custom; 3. *Ad ostium ecclesiæ;* 4. *Ex assensu patris;* and 5. *De la plus belle.* These five divisions of dower will be treated separately.

Dower at common law may be defined as the third part of all the lands whereof the husband had been seised, during the coverture, of such an estate as the children by such wife

might by possibility have inherited, and to which, by the death of the husband, the wife was entitled for her life.

In order for dower to attach the age of the husband was immaterial; but the wife had no dower unless she was nine years old. The reason of this would appear to have been, that the wife could not take any dower if she were incapable of having issue. The support of the children was part of the consideration on which the wife's right to dower was founded, and as, on the one hand, it was considered unreasonable to extend it to such women as were incapable of having children, so, on the other hand, it was considered unreasonable to exclude women because of the incapacity of their husbands. As long as the woman was over the age of nine years she had her right to dower no matter how much she was over that age, for the law would not determine the precise time at which her capacity of having children ceased.

If a woman who was an alien married an Englishman she obtained no dower, for an alien was incapable of acquiring any freehold; but if the king married an alien his wife obtained her dower by the law of the Crown.

Richard the First erected a Court where all the real and personal estate of the Jews was registered. On the death of a Jew his estate passed to the king, though it could be redeemed by his children on the payment of a fine. A Jewish woman claiming her dower would have to come to this Court, and she could only claim her dower as against a Jew. Nor could she demand it at common law as against a Christian (*a*).

A woman attainted of treason or felony had no dower, but if she were pardoned she could demand it, even though the husband had disposed of his land in the meantime, because she was entitled to her dower by reason of her marriage and the seisin of her husband, and when the impediment was removed her capacity was restored.

At common law, if a man were attainted of treason or felony his wife lost her dower, for the feudatory thereby forfeited his feud. This was altered in 1547, it being enacted

(*a*) Hollingshed, vol. 3, p. 15.

by a statute passed in the reign of Edward the Sixth (*b*), that if a man were attainted of treason or felony his wife should still have her dower; but this provision was repealed, as far as treason was concerned, in 1552 (*c*); and it made no difference if the husband had received a pardon for his treason.

After the passing of 1 Edw. 6, c. 12, it was doubted whether the wife would lose her dower in the event of the husband committing any new felony, that is, a felony which was not a felony in 1547, but was subsequently made so, and consequently where certain offences were made felonies by statute, provision was generally made as to the wife's dower. For example, in 1562, a second forgery was made felony, and it was provided that no forfeiture of dower should be caused thereby (*d*), and similar provisions were made where in 1565 it was made a felony to transport rams, lambs or sheep (*e*); where in 1589 it was made a felony to embezzle armour, habiliments of war and victuals (*f*); where in 1604 it was declared to be felony to go about having the plague (*g*); and where in 1605 it was made felony to serve foreign princes without first taking the oath of obedience (*h*).

If a woman became a lunatic and killed her husband, she still had her dower; as, owing to her want of understanding, she had committed no felony. So if an idiot or lunatic married and died, his widow took her dower, there being no forfeiture, and the king having only the custody of the inheritance in one case, and the power of providing for him and his family in the other. In both cases the freehold of inheritance was in the husband (*i*). If, therefore, lands descended to an idiot or lunatic after marriage, and the king, on office found, took the lands into his custody, or conveyed them to another as committee, the wife had her dower, for her title did not commence till the death of her husband, at which time the title of the king ceased.

Before the Conquest, the widow, in order to obtain her

(*b*) 1 Edw. 6, c. 12, s. 17.
(*c*) 5 & 6 Edw. 6, c. 11, s. 13.
(*d*) 5 Eliz. c. 14, s. 8.
(*e*) 8 Eliz. c. 3, s. 3.
(*f*) 31 Eliz. c. 4, s. 2.
(*g*) 1 Jac. 1, c. 31, s. 8.
(*h*) 3 Jac. 1, c. 4, s. 37.
(*i*) Co. Litt. 31 a.

dower, was bound to remain in her husband's house, out of which she was dowable for a year after his death; and if she married before that time she lost not only her dower, but, in addition, whatever the husband might have left her. It was provided by Magna Charta, c. 7, that a widow, after the death of her husband, should remain forty days in the chief house of her husband, within which time her dower was to be assigned to her. If the chief house were a castle, and she departed from it, a competent house was to be forthwith provided for her, and she was to have all reasonable estovers of the common. This term of forty days was called *quarentina*. If the widow married within the forty days she lost her quarentine (*k*).

These provisions were not of any great benefit to the widow, for if the dower was withheld there was no penalty; but it was provided, in 1235, by the Statute of Merton (*l*), that a widow should recover damages in a writ of dower, which damages were the value of the whole dower from the time of the death of the husband to the day on which, by the judgment, the widow recovered seisin of her dower; and by the Statute of Gloucester (*m*) she could recover costs as well as damages.

A widow was not dowable out of an annuity granted to her husband and his heirs, after a writ of annuity brought, that is, a writ for the recovery of the annuity; but if a rent-charge were granted to a man and his heirs, and on his death the widow brought a writ of dower, the heir could not, by claiming it to be an annuity, defeat the widow's dower; but if he obtained judgment on his writ of annuity before the wife, it then became an annuity *in perpetuum*, and the wife's dower was barred (*n*).

The wife of a copyholder took no dower, or freebench as it is commonly called, unless there was a special custom enabling her to do so; but if there was such a custom she had the

(*k*) Co. Litt. 32 b.
(*l*) 20 Hen. 3, c. 1.
(*m*) 6 Edw. 1, c. 1.
(*n*) Co. Litt. 32 a, 144 b.

benefit of the laws for the recovery of dower, including the recovery of damages under the Statute of Merton.

A woman could not have any dower out of a castle for the defence of the realm, for she was considered as unable to assist in its defence. Neither could she in early days take any interest in a house that was *caput baroniæ* or *comitatûs* (*o*), because it would lessen the position of the family, and would disable the heir from supporting his position with sufficient dignity. But in 1693 it was decided that a widow could take her dower out of a *caput baroniæ* (*p*), on the ground that the *caput baroniæ* mentioned in the ancient authorities was held by military tenure, which was then extinct. There was also another ground for this decision, namely, that the husband having been made a baron after the marriage, the widow could not thereby be deprived of her dower.

Previous to 1540 a widow took no dower in tithes, but tithes being made a lay fee in the reign of Henry the Eighth (*q*), she became entitled to dower thereout.

A widow was entitled to dower out of a common in gross and out of an advowson, and also in a villein in gross or a villein regardant, and in this latter case the dower took the form of the villein's work on every third day, week or month (*r*). She was also dowable out of a mill, a kiln-house, and a bailiwick, and out of the profits of a park-keeper, of a dove-house and a piscary (*s*).

In order for dower to attach the husband must have been seised of an estate in fee simple, fee tail general, or as heir of the special tail. A woman was not dowable out of her husband's estates tail after possibility of issue extinct; but if there were a tenant in special tail, with remainder to him in general tail or in fee, and his wife died without issue, and he married again and then died, his second wife was dowable; for, on the death of the first wife without issue, the husband thereupon became tenant in tail after possibility of issue

(*o*) Co. Litt. 30 b.

(*p*) *Gerard* v. *Gerard*, Salk. 253.

(*q*) 32 Hen. 8, c. 7.

(*r*) Co. Litt. 32 a.

(*s*) Co. Litt. 32 a.

extinct, which, being only an estate for life, was merged in the remainder in tail or fee (*t*).

In 1697 it was decided that where property was limited to a tenant for life, remainder to trustees for ninety-nine years, remainder to the tenant for life in tail, that the widow of the tenant was dowable notwithstanding the intervening estate, for that intervening estate being only for years was not to be regarded, and, at common law, the freeholder might have destroyed it by a feigned recovery; but it would have been otherwise if the intervening estate had been for life, for that would have obstructed the dower (*u*).

As before stated, the husband must be absolutely seised in possession; and a peculiar case arose on this point in the reign of Elizabeth. Property was limited to father and son as joint tenants, with remainder to the heirs of the son. Both father and son were hanged out of one cart. The widow of the son demanded her dower, alleging that her husband survived his father, the tokens of this being his shaking his legs, and judgment was given for the demandant (*x*).

The wife's dower could continue, even though the estate out of which she was dowable had ceased. Thus, if rent or land were granted to a man in tail, and he married, and then died without leaving issue, and the donor entered, the widow nevertheless had her dower (*y*).

An owner in fee simple of lands, by an indenture inrolled, bargained and sold them for 120*l.*, in consideration that the bargainee should redemise them to the bargainor and his wife for their lives, rendering a peppercorn, and with a condition that if the bargainor paid the 120*l.* at the end of twenty years the bargain and sale should be void. The bargainee redemised the land accordingly and died. His wife claimed dower, and the question of her right was determined by Sir George Croke and Justice Jones in 1630 (*z*). The report says:—"We conceived it to be against equity, and the agree-

(*t*) 1 Rolle, Abr. 677.
(*u*) *Bate's case*, Salk. 254.
(*x*) *Broughton* v. *Randall*, Cro. Eliz. 502.
(*y*) Co. Litt. 141 a.
(*z*) *Nash* v. *Preston*, Cro. Car. 190.

ment of the husband at the time of the purchase, that she should have it against the lessees, for it was intended they should have it redemised immediately unto them as soon as they parted with it; and it is but in nature of a mortgage. And upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if a husband takes a fine *sur cognisance de droit come ceo*, and renders arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu*, and by one and the same act. Yet, in this case, we conceived that by the law she is to have dower, for, by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have dower. And when he redemises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as it is the ancient course in mortgages. And when she is dowable by act or rule in law, a Court of equity shall not bar her to claim her dower, for it is against the rule of law. Where no fraud or covin is, a Court of equity will not relieve. And upon conference with other the justices at Serjeants' Inn upon this question, who were of the same judgment, we certified our opinion to the Court of Chancery—that the wife of the bargainee was to have dower, and that a Court of equity ought not to preclude her thereof."

If a husband made a feoffment of his lands, and the feoffee improved their value, the widow only had her dower according to their value at the time they belonged to her husband (*a*); but if the husband's lands passed to the heir, who improved their value by building or sowing, the widow recovered her dower with the improvement upon it; and, similarly, if the value of the land decreased, she had to share in the loss (*b*).

The things necessary to the consummation of dower were marriage, seisin, and the death of the husband.

If a man entered into a contract of matrimony with a woman, but died before the marriage was solemnised, the woman took no dower.

(*a*) Co. Litt. 32 a, n. (8). (*b*) Co. Litt. 32 a.

In the reign of Henry the Third it was held that a woman married in a house was not entitled to dower (*c*), and that the marriage ought to be *in facie ecclesiæ;* but in 1533, by "the Act concerning Peter-pence and dispensations" (*d*), the Archbishop of Canterbury was allowed to grant special licences for marriages in unconsecrated places, and the same right was reserved in 1753 in "the Act for the better preventing of clandestine marriages" (*e*)

A woman up to the age of twelve, and a man up to the age of fourteen, were considered as incapable of consent to marriage, and if either of them at that age dissented to the marriage it thereupon became void *ab initio*, and the woman had no right to dower, but the bishop, upon an issue joined in a writ of dower, "*Quod nunquam fuerunt copulati legitimo matrimonio*," had to certify that they were lawfully married, although the husband was, at the time of his death, under fourteen, and the wife under twelve, on the ground that the marriage was good until avoided, and that it could not be avoided after the death of the husband (*f*).

In the case of a divorce *causâ adulterii* under the old divorce law, the wife still had her dower, for the marriage was not dissolved, the parties being merely separated *a mensâ et thoro*. The same rule applied to a divorce *propter sævitiam* or *metum*, and *causâ professionis;* but in the case of a divorce *causâ præcontractûs, causâ consanguinitatis, causâ affinitatis*, or *causâ frigiditatis*, there was no dower, for these destroyed the *vinculum matrimonii*. However, in 1540, many of the excuses for divorce were done away with by statute (*g*).

The husband had to be seised either in deed or at law to entitle his wife to dower. If seisin at law had not been sufficient, the husband would have been able to defeat his wife's dower by his own negligence. Thus, if a man died seised of lands leaving his son his heir-at-law, and the son died before he entered into the lands, the son's widow was entitled to dower. But if there was no seisin either in deed

(*c*) 16 Hen. 3.
(*d*) 25 Hen. 8, c. 21.
(*e*) 26 Geo. 2, c. 33, s. 6.
(*f*) Co. Litt. 33 a.
(*g*) 32 Hen. 8, c. 38.

or at law, the wife had no dower. For example, if a man were disseised of lands and then married, and died before he had made any entry, the widow was not dowable.

Not only was it necessary for the husband to be seised, but he had also to be solely seised, and therefore a widow took no dower out of an estate of which her husband had been seised as a joint tenant with another person.

In order for dower to attach the husband had to be dead. This meant natural death, and not civil death; for, if a husband entered into religion, the wife obtained no dower until the natural death of the husband; the reason was, because *post carnalem copulam*, the husband could not be professed without the consent of the wife (*h*), and if she dissented his profession was void. If she assented she was considered, to a certain degree, to have vowed chastity as well as her husband.

If a woman were dowable out of several pieces of land, for example, out of three manors, and one of them were assigned to her by the heir in lieu of all the rest, this was good, though it was against her common right, which gave her one-third in each of the pieces of land; but if lands, out of which she had no right to dower, were assigned to her, this was no bar to her dower (*i*).

A woman entitled to dower could not enter until it was assigned to her, and set out either by the heir, tertenant or sheriff (*k*).

In 1434 it was held (*l*), that an assignment of dower by commission *de dote assignandâ* out of the court of wards was no bar to dower, but that it ought to have been by writ *de dote assignandâ* out of Chancery, the jurisdiction of which Court was not given to the court of wards in such a case by 32 Hen. 8, c. 46.

The widow of a tenant who held lands of the king *in capite*, and whose heir was an infant and therefore the king's ward, had to present a petition to Chancery in order to recover her

(*h*) Co. Litt. 33 b.
(*i*) Co. Litt. 34.
(*k*) 1 Rolle, Abr. 681.
(*l*) *Stainfield* v. *Binden*, Cro. Eliz. 364.

dower. After proof that she was the tenant's widow, she was bound to make an oath that she would not marry again without the consent of the king, and thereupon a writ *de dote assignandâ* issued out of Chancery to the escheator, to assign to her dower of one-third of all the lands of which her husband had been seised. But if the heir was of full age at the time of her husband's death, she could not present her petition in Chancery, the king only having the lands for the purposes of his primer seisin, and not being the guardian. It was therefore provided by statute in 1324 (*m*), that the king might assign dower to the widow, even though the heir was of full age at the time of the tenant's death. The statute provided that the king should assign to widows, after the death of their husbands, that held of him in chief, the dower that to them belonged, "*Si vidue voluerint;*" these words left the widow at liberty either to present a petition to the king in Chancery, or to sue the heir in the Court of Common Pleas. If the king had committed the wardship of the infant heir to another, *durante minore ætate*, then the widow had, at common law, the right of electing either to present her petition to the king in Chancery, for, notwithstanding the commitment, the king still remained the guardian, or to sue the committee at common law and recover from him without making the king a party; and when she proceeded by the latter alternative, and recovered from the committee, she had not to take the same oath as when she proceeded in Chancery. Nevertheless, although she was not compelled to take the oath, still she could not marry without the king's consent, it being against the policy of the times, as she might thereby bring enemies or foreigners into the king's domains.

In 1324 it was further provided (*n*), that when any tenant *in capite* died, and his heir entered into the land and died before he had done homage to and received seisin of the king, he should gain no freehold, and his widow was not to be endowed out of the lands. This Act was passed in consequence of a claim made by Maud, daughter of the Earl of

(*m*) 17 Edw. 2, c. 4. (*n*) 17 Edw. 2, c. 13.

Hereford and wife to Maunsel, Earl Marshal of England. On the death of William, Earl Marshal of England, his brother, Maunsel, took his seisin of the castle and manor of Scrogoil, and died in the same castle before he had entered by the king, and before he had done homage to him; and his widow claimed her dower.

If a husband seised in fee of lands exchanged them for others and then died, the widow could elect whether her dower should be out of the lands given or taken in exchange, but she could not be endowed out of both (*o*).

If there were a father and a son, and the father died seised in fee, and the son endowed the father's wife, then the wife of the son was only dowable out of two-thirds of the land, and she took no dower out of the mother's third; for the dower of the mother defeated the descent to the son *pro tanto*, and consequently, he was only entitled to two-thirds of the land. But if the father had enfeoffed the son of the whole land and then died, and his widow had been endowed by recovery or assignment, then the son's wife was dowable out of the mother's third after her death (*dos de dote*); for by the feoffment the son was entitled to the whole estate, and not only to two-thirds; and although the mother obtained her third, this did not defeat the operation of the feoffment (*p*). And if there were grandfather, father and son, and the two first died, and the mother were endowed either by assignment or recovery in a writ of dower, and the grandmother brought a writ of dower against the mother and recovered, the reversion remained in the mother, and on the death of the grandmother the mother could recover the third obtained from her (*q*).

Where a testator devised lands, which were subject to his wife's dower, to a devisee in fee, and on the death of the devisee his widow recovered her dower without regard to the prior title of the testator's widow to dower, it was held by the Lord Keeper, in 1700, that the testator's widow having taken no steps to recover her dower, her title was to be laid

(*o*) Co. Litt. 31 b. (*p*) Co. Litt. 31 a. (*q*) Co. Litt. 31 b.

out of the case, and therefore that the dower of the devisee's widow was not to be regarded as a *dos de dote* (*r*).

If a recovery were obtained against a husband by collusion, this did not bar his widow's dower; but anciently it was doubtful whether the dower would not be barred if the recovery were by default, and it was therefore provided by statute in the reign of William the Second (*s*), that notwithstanding recovery by default pleaded in bar of dower, the tenant should show his right to the tenements recovered; and that if it should appear that he had no right, the demandant should recover her dower, notwithstanding the recovery by default against her husband.

If a husband levied a fine with proclamation of his land, and then died, his widow had to bring her claim within five years from his death, and if she did not claim within that period her dower was barred.

If a husband and wife joined in levying a fine, or suffering a recovery of the husband's lands, the wife's dower was barred; for in both cases she was examined by the judges as to her consent, and there was no reason of her joining except to bar her dower. But if a wife joined with her husband in a bargain and sale, by deed indented and enrolled, the wife's dower was not barred; for the wife could not be examined by any Court without a writ, and there was no writ in this case.

If a woman eloped from her husband it was no bar to her dower at common law, even though a divorce were obtained for the adultery; but in the reign of William the Second it was enacted, "Si uxor sponte relinqueret virum suum, et abierit et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, quæ ei competere posset de tenementis viri sui, si super hoc convincatur, nisi vir suus sponte et absq; coertione ecclesiæ eam reconciliet, et secum cohabitare permittat, in quo casu restituatur ei actio" (*t*).

The most common method of barring dower was by jointure.

(*r*) *Hitchens* v. *Hitchens*, 2 Vern. 403.

(*s*) Will. 2, c. 4.

(*t*) Will. 2, c. 34.

Strictly speaking, a jointure meant a joint estate limited to both husband and wife; but it was generally understood to mean a sole estate limited to the wife only. A jointure is defined by Lord Coke as "a competent livelihood of freehold for the wife, of lands or tenements, to take effect presently in possession or profit after the death of the husband, for the life of the wife at least, if she herself be not the cause of the determination or forfeiture of it" (*u*). Before the reign of Henry the Eighth a jointure did not bar dower at common law, the common law method of barring dower being by dower *ad ostium ecclesiæ* or *ex assensu patris;* but in 1535 it was enacted as follows (*x*), "That whereas divers persons have purchased, or have estates made and conveyed of and in divers lands, tenements and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the said wife; or where any such estate or purchase of any lands, tenements or hereditaments hath been or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointer of the wife; that then in every such case, every woman married having such jointer made, or hereafter to be made, shall not claim, nor have title to have any dower of the residue of the lands, tenements or hereditaments, that at any time were her said husband's, by whom she hath any such jointer, nor shall demand, nor claim her dower of and against them that have the lands and inheritances of her said husband; but if she have no such jointer, then she shall be admitted and enabled to pursue, have and demand her dower by writ of dower, after the due course and order of the common laws of this realm; this Act or any law or provision made to the contrary thereof notwithstanding.

(*u*) Co. Litt. 36 b. (*x*) 27 Hen. 8, c. 10, s. 6.

Provided alway (*y*), that if any such woman be lawfully expulsed or evicted from her said jointer, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expulsed shall amount or extend unto. Provided also (*z*), that if any wife have, or hereafter shall have, any manors, lands, tenements or hereditaments, unto her given and assured after marriage, for term of her life, or otherwise in jointer, except the same assurance be to her made by Act of Parliament, and the said wife after that fortune to overlive her said husband, in whose time the said jointer was made or assured unto her, that then the same wife so outliving shall and may at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed, or assured during the coverture, for term of her life or otherwise in jointer; except the same assurances be to her made by Act of Parliament, as is aforesaid, and thereupon to have, ask, demand, and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements, and hereditaments as her husband was and stood seised of any state of inheritance at any time during the coverture, anything contained in this Act to the contrary thereof notwithstanding."

In order to make a good jointure within this statute six things were necessary, namely (*a*),—

1. The estate had to take effect immediately from the death of the husband.

2. It had to be for the term of the wife's life, or for some greater estate.

3. It had to be made to the wife herself and not to others in trust for her.

4. It had to be in satisfaction of the whole of the dower and not in satisfaction of a part only.

(*y*) Sect. 7. (*z*) Sect. 9. (*a*) Co. Litt. 36 b.

5. It had to be expressed as given in satisfaction of dower.
6. It could not be made during coverture.

Lord Coke says, that it could be made either before or after the marriage; but the Act provided that, if the jointure were made during the coverture, the widow could reject it and take her dower instead.

A widow held her dower discharged from all judgments, recognizances and other incumbrances made by the husband after marriage; for the widow's dower, which was consummate at the death of her husband, related back to the interest of the husband at the time of the marriage, that is, before the incumbrances were created.

In 1692 it was provided by statute (*b*), that the widow of a mortgagor should not be barred of her dower if she had not joined in the mortgage.

In the year 1235 it was enacted that tenants in dower might bequeath the crops growing on their lands at the time of their death (*c*); previous to this statute it was a question of doubt whether they could do so. The word "*blada*" used in the statute includes flax, hemp, corn and other crops that were produced by the labour of man; but it did not include trees, grass and the like.

Before the Statute of Marlborough in dower made *unde nichil habet*, there were days of common return; this was a cause of considerable injury to the widow; she had only a life interest to obtain, and it kept her out of this interest for a considerable time; it was therefore enacted, in 1267, that from thenceforth in a plea of dower *unde nichil habet*, four days of return were to be given in the year at least, and more if convenient, so that there should be five or six days, at least, in the year (*d*). These provisions did not extend to a writ of dower, nor to dower *ad ostium ecclesiæ* or *ex assensu patris;* but the same return was given to every writ of dower by a statute passed in 1540 (*e*).

If the heir, when under age, assigned to the widow as

(*b*) 4 Will. & M. c. 16, s. 5.
(*c*) 20 Hen. 3, c. 2.
(*d*) 52 Hen. 3, c. 12.
(*e*) 32 Hen. 8, c. 21.

dower more than she was entitled to, he had, at common law, on attaining full age, the writ of administration of dower; and if he died his heir had the same writ to rectify the assignment. If the guardian had made the assignment, still the heir could not have the writ until he was of full age.

If before the guardian entered into his guardianship an infant heir assigned too much by way of dower, then originally the guardian had no remedy; but in the reign of William the Second it was provided, by statute, that in such a case the guardian should have a writ of administration (*f*). The reason why the guardian had previously no remedy was, that this writ of administration was a real action, and could not be brought by the guardian, who had only a chattel interest.

Dower by the custom varied and was governed according to the custom and usage of each place; and if any particular custom prevailed the widow could not waive her customary right and claim her dower at common law, for *consuetudo tollit communem legem* (*g*).

By the custom of gavelkind in Kent, the widow took half her husband's lands, and her interest lasted as long as she was unmarried and chaste; and she was presumed to be chaste until she was delivered of a child begotten during her widowhood (*g*).

By the custom of borough-English the widow had the whole of her husband's lands for life. Probably the reason of this was, that by this custom the eldest son was brought up in the trade or employment of his father, and the land descended to the youngest son; and the widow having the guardianship of the younger children, had the whole of the lands during her life, as a means of supporting them. Ancient rent or common in borough-English and gavelkind was of the nature of land, and the widow was dowable thereout. But where by a custom a widow was dowable out of one-half of her husband's lands and tenements, she took no dower out of

(*f*) Will. 2, c. 7. (*g*) Co. Litt. 33 b.

a fair or bailiwick, for these were neither lands nor tenements. However, if the fair or bailiwick formed part of a manor out of which the widow was dowable, then she had a moiety of the profits of the fair or bailiwick, as appendant to her moiety of the manor.

Dower *ad ostium ecclesiæ* was where a man of full age, seised in fee, endowed his wife after marriage at the church door of his whole land, or of the half or other part of his land, and openly declared the quantity of land which she was to have for her dower. In this case the wife, after the death of the husband, could enter into the land of which she had been endowed by her husband without any assignment (*i*). In the time of Glanvil a man could not endow his wife *ad ostium ecclesiæ* of more than one-third part of his land, but he might endow her of less if he wished (*k*). This kind of dower could not be made till after marriage. Moreover, it appears that it could not be made at any time after, but had to be made immediately after marriage (*l*).

Dower *ex assensu patris* was where the father was seised of tenements in fee, and his son and heir-apparent, when he was married, endowed his wife at the monastery or church door of his father's lands or tenements with the assent of his father, and specified the quantity. On the death of the son, his widow entered into her dowry without any assignment. The assent of the father had to be by deed (*m*).

In order for a husband to be able to endow his wife *ex assensu patris*, it was necessary that he should be such an heir-apparent as must continue an heir-apparent; and therefore the youngest son and heir-apparent could not endow his wife *ex assensu patris* of lands, whereof the father was seised in fee, of the nature of borough-English, for the father might have had another son, and the husband would no longer have been the heir-apparent (*n*). If the heir were under age, still the dower *ex assensu patris* was good, for the estate did not move from

(*i*) Litt. 39.
(*k*) Glan. lib. 6, cap. 1.
(*l*) Co. Litt. Butler's ed. note [211].
(*m*) Litt. 50.
(*n*) Co. Litt. 35 b.

him, but from the father (*o*). Dower *ex assensu matris* was as good as dower *ex assensu patris* (*p*).

These dowers, *ad ostium ecclesiæ* and *ex assensu patris*, if the wife took them, were, as before stated, a bar to her dower at common law; but she might waive them if she wished, and claim her dower at common law, for, being made after the marriage, she was not bound by them (*q*). The widow could recover her dower *ad ostium ecclesiæ* and *ex assensu patris* by a writ of dower, and these dowers being made by assent were good, even though the wife was under the age of nine years at the time of her husband's death (*r*). They were forfeited if the husband committed high or petit treason, and before the reign of Edward the Sixth they were forfeited if he was attainted of felony or murder. It was enacted in 1547 (*s*) that a woman should not lose her dower, although her husband had been attainted of treason, petit treason, misprision of treason, murder, or felony; but this was partly altered in 1552, when it was provided (*t*) that she should lose her dower if her husband was attainted of high or petit treason.

Dower *de la plus belle* was where a man was seised of lands, part of which he held by knight-service and the residue in free and common socage, and died, leaving an heir under the age of fourteen years. The lord of the knight-service lands thereupon entered upon them and held them as guardian in chivalry during the minority of the infant heir, and the widow entered into the socage lands as guardian in socage. If, then, the widow brought a writ of dower against the guardian in chivalry to be endowed out of the tenements held by knight-service, the guardian in chivalry might plead the before-mentioned facts, and pray that the Court should order the widow to endow herself *de la plus belle*, that is, of the fairest of the tenements which she had as guardian in socage (*u*). The reason of this was to prevent the splitting up of the lands held in chivalry, which were for the defence

(*o*) Co. Litt. 35 b, 38 a.
(*p*) Co. Litt. 35 b.
(*q*) Co. Litt. 36 b.
(*r*) Co. Litt. 37 a.
(*s*) 1 Edw. 6, c. 12, s. 17.
(*t*) 5 & 6 Edw. 6, c. 12, s. 13.
(*u*) Litt. 48.

of the realm. After judgment was given the widow could call her neighbours together, and in their presence endow herself of the fairest parts of the tenements which she had as guardian in socage, up to the value of one-third part of the tenements which the guardian in chivalry had (*x*). If the lands which she held as guardian in socage were not of sufficient value for her dower, she could recover the residue from the guardian in chivalry (*y*).

The leading idea lying at the root of the law of dower was, that the widow ought to be provided for and have something on which to maintain herself and her younger children; and undoubtedly in its origin the provision of dower was particularly meritorious, but in course of time various abuses crept in, principally owing, Mr. Macqueen thinks, to the "unhappy rulings of the judges, who in former ages administered the law, and sometimes made it." These early administrators of the law did not admit dower out of trust or equitable estates. The common law regarded nothing but legal estates, and equity was feeble and imperfect; and when equity in course of time became strong, it was too late to interfere. Again, dower was held to attach not only to what the husband died seised of, but to all the land of which he had been seised at any time during the coverture. This latter rule was a great drawback to the transfer of land.

One or two methods of barring dower have been previously mentioned, for example, dower *ex assensu patris*, dower *ad ostium ecclesiæ*, and jointure; but these, with the exception of jointure made previous to marriage, were not absolutely a bar to dower, and the widow could reject them and take her dower at common law if she wished; moreover, the two former methods could only be adopted at the time of the marriage. Conveyancers had therefore to find other means of barring dower. One of these was that the purchaser should require the conveyance to be made to himself and a trustee. Now, as before stated, a wife was not dowable out of an estate of which her husband was seised as joint tenant,

(*x*) Litt. 49. (*y*) Perk. 450.

and, consequently, the wife of the purchaser took no dower. The drawback to this method was, that if the trustee died before the husband the husband became solely seised, and the wife's right of dower at once attached.

A far more successful method of barring dower was the conveyance to uses to bar dower. It is unnecessary to say anything here about the limitations in this well-known provision; it is enough to remark that its inventor took advantage of the rules that a widow was not entitled to dower out of an equitable estate, nor unless her husband had been seised of an estate of inheritance in possession; had a widow been dowable out of equitable estates the conveyance to uses to bar dower would have been useless.

If there was a satisfied term attendant upon the inheritance of land about to be sold, and the purchaser was desirous of having the land free from his widow's dower, he could effect this by having the term assigned to a trustee of his own choosing, and the widow had to wait for her dower until the determination of the term, which was practically a bar. This point was decided by the House of Lords, in the case of *Lady Radnor* v. *Vandebendy*.

Commenting upon this decision Mr. Cruise remarks (*z*), "It is contrary to the general principles of equity, which has never extended its protection in any other instance to purchasers with notice of incumbrances. The true and only reason on which it was founded was the silent, uniform course of practice, uninterrupted, but at the same time unsupported by legal decisions; an opinion having been generally adopted by the conveyancers, that a satisfied term would protect a purchaser from the claim of dower; and many estates having been purchased under this opinion." In 1845 it was enacted that every satisfied term of years which should upon the 31st day of December, 1845, be attendant upon the inheritance of any lands, should on that day absolutely cease and determine (*a*), and consequently this mode of barring dower was abolished.

(*z*) Cruise's Digest, tit. Trust. sect. 41.

(*a*) 8 & 9 Vict. c. 112.

In 1833 the Act for the Amendment of the Law relating to Dower was passed (*b*). It enacted that after the Act came into operation, that is, on and after the 1st of January, 1834, widows should be entitled to dower out of their husband's equitable estates (*c*); that no widow should be entitled to dower out of any land which should have been absolutely disposed of by her husband in his lifetime or by his will (*d*); that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which the husband's lands should be subject or liable, should be valid and effectual as against the right of his widow to dower (*e*); that a widow should not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it should be declared that his widow should not be entitled to dower out of such land (*f*); that a widow should not be entitled to dower out of any land of which her husband should die wholly or partially intestate, when by the will of her husband, duly executed for the devise of freehold estates, he should declare his intention that she should not be entitled to dower out of such land or out of any of his land (*g*); that the right of a widow to dower should be subject to any conditions, restrictions, or directions which should be declared by the will of her husband (*h*); that where a husband should devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow should not be entitled to dower out of or in any land of her said husband, unless a contrary intention should be declared by his will (*i*); that no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, should defeat or prejudice her right to dower, unless a contrary intention

(*b*) 3 & 4 Will. 4, c. 105.
(*c*) Sect. 2.
(*d*) Sect. 4.
(*e*) Sect. 5.
(*f*) Sect. 6.
(*g*) Sect. 7.
(*h*) Sect. 8.
(*i*) Sect. 9.

should be declared by his will (*k*); that nothing in the Act contained should prevent any Court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them (*l*); that nothing in the Act contained should interfere with any rule of equity, or of any ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower were entitled to priority over other legacies (*m*); and that no widow should thereafter be entitled to dower *ad ostium ecclesiæ* or dower *ex assensu patris* (*n*).

This Act did not apply to the dower of any widow married before the 1st of January, 1834 (*o*).

The late Mr. Joshua Williams thus comments upon the Act (*p*):—"The effect of the Act is evidently to deprive the wife of her dower, except as against her husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support, unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has, unfortunately, found its way, as a sort of common form, into many purchase deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united possibly with some misapprehension of the effect of the new enactment. But surely, if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband, and far superior if the heir be a lineal ancestor or remote relation. The proper method seems, therefore, to be, to omit any such declaration against dower, and so to leave to the widow a prospect of sharing in the lands, in case her lord shall not think proper to dispose of them."

In a recent case, A. being lessee of land for ninety-nine years, created a mortgage term which ultimately became vested in a trustee for a mortgagee, and subsequently acquired the

(*k*) Sect. 10.
(*l*) Sect. 11.
(*m*) Sect. 12.
(*n*) Sect. 13.
(*o*) Sect. 14.
(*p*) Real Property, 11th ed. 235.

fee. He afterwards became bankrupt. In pursuance of an agreement between his assignees, himself, and the mortgagee, a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee, freed and discharged from all equity of redemption. It was intended that the wife of A., who was married in 1832, should join in the deed for the purpose of releasing her dower, but she refused to execute it, and after the death of A. she filed her bill to enforce her right to dower. But the Court of Appeal in 1872 held, reversing the decision of Vice-Chancellor Bacon, that the mortgage debt was not extinguished, that the term was not satisfied within the second section of the Satisfied Terms Act, and that the term afforded the purchaser protection against the plaintiff's right of dower (*q*).

In 1876 it was held by Vice-Chancellor Malins that a widow was not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower (*r*).

Where a wife, married before the Dower Act, joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate to secure his debt, and the equity of redemption was reserved to the husband, it was held by the Court of Appeal, in 1877, that the widow's right to dower was extinguished in equity, as well as at law (*s*).

The treatment of the law of dower must necessarily be more of a history of the past than a statement of the present state of the law. It is a subject that is becoming less important every day, for the old law of dower only applies to the case of women married before 1834, and a woman married after that date is only dowable when her husband has died intestate with regard to his realty, and without having executed a declaration against dower.

(*q*) *Anderson* v. *Pignet*, L. R., 8 Ch. 180.

(*r*) *Roper* v. *Roper*, 3 C. D. 714.

(*s*) *Dawson* v. *Bank of Whitehaven*, 6 C. D. 218.

CHAPTER VIII.

COURTESY OF ENGLAND.

According to Littleton a tenant by the courtesy of England was, where a man married a wife seised in fee of lands and had issue by her born alive. On the death of the wife, the husband was entitled to hold the lands during his life. He adds, that he was called tenant by the curtesie of England, because it was used in no other realm but England (*a*). This latter statement is not correct: it existed in Ireland and was introduced there at the same time as in England, namely, in the reign of Henry the First; it was introduced into Scotland in the reign of Malcolm, and was known there under the name of *Curialitas Scotiæ* (*b*); moreover, by a rescript of Constantine, it was established *ut hæreditatis maternæ pater usum fructum, filii proprietatem haberent.* According to Sir William Blackstone, the husband's interest was called courtesy, not as denoting any particular favour belonging to England, but as signifying an attendance upon the lord's court or curtis, that is, as signifying that the tenant by courtesy was the tenant or vassal of the lord (*c*).

The law is thus stated in a writ of 11 Hen. 3 (*d*) :—"Si aliquis desponsaverit aliquam mulierem, sive viduam, sive aliam, hæreditatem habentem, et ipse postmodum ex eâ prolem suscitaverit, cujus clamor auditus fuerit inter quatuor parietes, idem vir, si super vixerit ipsam uxorem suam, habebit totâ vitâ suâ custodiam hæreditatis uxoris suæ licet ea fortè habuerit hæredem de primo viro suo qui fuerit plenæ ætatis." And by a statute placed by Pickering in his edition of the statutes published in 1762, twelfth of the

(*a*) Litt. 35.
(*b*) Co. Litt. 30 a.
(*c*) 2 Com. 126.
(*d*) Rot. Claus., 11 Hen. 3; Wright's Tenures, 193, n. 9.

statutes of uncertain date, it was provided "cum quis itaque terram cum uxore in maritagio ceperit, si ex eadem uxore sua heredem filium vel filiam clamantem auditum intra quatuor parietes habeat procreatum, si idem vir uxorem suam supervixerit, sive heres vivat, sive non, ipsi viro remanebit maritagium illud, post mortem viri ad donatorem vel ad ejus heredem reversurum: si autem nullum ex uxore sua habuerit heredem, tunc post mortem uxoris ad donatorem vel ad ejus heredem revertetur. Et hec est causa, quare in maritagio non solet recipi homagium. Si enim donata esset aliqua terra sic in maritagium, vel alio modo, quod cum recipiatur homagium, tanquam ad donatorem de cetero vel ad ejus heredem licite posset reverti, ut supradictum est. Illud vero judicium erit de secundo viro, quod dictum est de primo, si heres reliquerit primo, sive non."

According to Glanvil (*e*), a husband could only have his courtesy out of the lands given with his wife *in maritagium*, but by the time of Bracton the right was extended; he says (*f*), that the husband had his courtesy, if he married a woman *habentem hæreditatem vel maritagium, vel aliquam terram ex causâ donationis*, having any inheritance, whether a *maritagium* or other gift of land. Both Glanvil and Bracton agreed that a second husband had as much right to courtesy as a first; but in the reign of Henry the Third, Stephanus de Segrave wrote a treatise, in which he objected to this rule, as founded on a misconception of the meaning and design of the estate. He thought there was an injustice in giving an estate *per legem Angliæ* to a second husband, particularly when there were children of the first marriage living (*g*). Moreover, this was the opinion of the Legislature, for in 1285 it was enacted by the *Statute de Donis* (*h*), that a second husband should not have any courtesy out of his wife's conditional fee.

Idiots, lunatics, and villains might be tenants by the courtesy, and so also might husbands convicted of felony

(*e*) Lib. 7, c. 18.
(*f*) Lib. 5, c. 30, § 7.
(*g*) Reeves' History of the English Law, vol. 1, p. 298.
(*h*) 13 Edw. 1, c. 1, s. 2.

or treason, for they forfeited absolutely only their goods and chattels, and the king gained only a pernancy of the profits of their lands (*i*). But if they were attainted of felony or treason, they lost their courtesy, for they were then *extra legem positi*, their persons were forfeited to the king, and they were incapable of taking anything under the law.

If a husband was attainted in *præmunire* (*k*), or if he was an alien enemy, or friend, he had no courtesy; but if the husband attainted of *præmunire* was pardoned, or the alien was made a denizen, he obtained his courtesy, if he had children born after the pardon or naturalisation, as the case might be.

At common law a man was not entitled to courtesy out of a use or trust, and in the preamble to the Statute of Uses (*l*) it was recited that this was one of the disadvantages that the statute intended to remedy. But at equity a husband was entitled to courtesy out of his wife's trust estates. Thus, a testatrix devised 300*l.* to be laid out in land, and settled to the use of her daughter and her children, and if she should die without issue then over. The daughter married, and had a child, and on her death the Court of Chancery, in 1705, held the husband to be tenant by the courtesy (*m*). The same question again arose in 1708. A testator devised lands of which he was seised in fee to trustees in fee upon trust for his two daughters equally. The younger daughter married and died, leaving an infant son and her husband surviving. The eldest daughter brought a bill for a partition, and the question was, whether the husband of the younger daughter should have an estate for life conveyed to him, as tenant by the courtesy. Lord Cowper, C., decreed that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the courtesy, had it been a legal estate, so should he be of the trust estate; adding, that if there were not the same rules of property in all Courts all things would be, as it were, at

(*i*) Co. Litt. 92 b, 391 a.
(*k*) Co. Litt. 391 a.
(*l*) 27 Hen. 8, c. 10.
(*m*) *Sweetapple* v. *Binden*, 2 Vern. 536.

sea, and under the greatest uncertainty (*n*). With all due deference to the authority of the Lord Chancellor, it is not easy to see how his decision prevented matters being "at sea." It is certainly inequitable that a husband should have courtesy out of his wife's equitable estates, and that a wife should not have dower out of her husband's equitable estates.

Notwithstanding the unfairness of these decisions, they were followed in numerous cases (*o*),—not, however, without protest. Thus, Lord Chancellor Talbot, in deciding the case of *Chaplin* v. *Chaplin* in 1733 (*p*), remarked that he took it to be settled that the husband should be tenant by the courtesy of a trust, though the wife could not have dower thereof; for which diversity, as he could see no reason, so neither should he have made it; but since it had prevailed he would not alter it.

A husband could not be tenant by the courtesy of his wife's copyholds unless there were an express custom to warrant it (*q*). The reason for this was that the freehold and the inheritance were in the lord, and the copyholder had merely a customary right to take the profits. The custom must be a law to itself, and all estates derived thereout were good so far as they were warranted by that law, but no farther. If, then, there was no custom for the husband to have courtesy out of his wife's copyholds, there was no law by which he could claim it. In *Sir John Savage's Case* (*r*) there was a custom that if a man took to wife a customary tenant of the manor, and had issue, and outlived her, he should be tenant by the courtesy; and a man married a woman to whom a customary tenement descended during the coverture, and had issue, and survived her; but it was held that he was not tenant by the courtesy, because the woman was not a customary tenant at the time of the marriage, and so not within the custom, which

(*n*) *Watts* v. *Ball*, 1 P. Wms. 108.

(*o*) *Otway* v. *Hudson*, 2 Vern. 583; *Willins* v. *Wray*, 2 Vern. 681; *Cunningham* v. *Moody*, 1 Ves. 174.

(*p*) 3 P. Wms. 234.

(*q*) *Paulter* v. *Cornhill*, Cro. Eliz. 361.

(*r*) 2 Leonard, 109, 208.

was to be taken strictly. However, in 1703, Chief Justice Holt and Justice Powel both denied that this case was law (*s*).

If an annuity were granted to a woman and her heirs, and she brought a writ of annuity, her husband had no courtesy out of the annuity, the effect of the writ being to make it personal (*t*).

A man could be tenant by the courtesy out of lands held in ancient demesne.

By custom, a man could be tenant by the courtesy of his wife's gavelkind lands without having issue by her (*u*); on the other hand, courtesy by the custom of gavelkind was subject to several disadvantages, for it extended only to a moiety of the wife's lands, and ceased if the husband married again.

It has been previously stated that by the provisions of *Prærogativa Regis*, c. 13 (*x*), if a tenant *in capite* died, and his heir died before he had done homage to and received seisin of the king, that his widow should have no dower; but this statute did not apply to the case of courtesy if the lands held *in capite* descended to a female, and if after office found she married, the husband became entitled to his courtesy on her death.

If a man married a neife of the king by licence, and had issue by her, and afterwards lands descended to the neife and the husband, and the husband entered, he became, on the death of the neife, tenant by the courtesy of the land, and the king, after office found, could not evict him, because by the marriage the neife was enfranchised during the coverture (*y*).

A husband could be tenant by courtesy of a castle which was one of the public defences of the realm, or of a house that was *caput baroniæ*, for he was able to defend the realm, and therefore the disabilities that applied to a woman taking dower did not apply to a man taking courtesy (*y*).

According to Lord Coke, a husband could have his courtesy out of a title of honour, or out of an office of honour, and he gives two instances. At the coronation of Richard the Second,

(*s*) 1 P. Wms. 62.
(*t*) Co. Litt. 144 b.
(*u*) Co. Litt. 30 a.
(*x*) 17 Edw. 2, st. 1.
(*y*) Co. Litt. 30 b.

"Johannes rex Castilæ et Legionis, Dux Lancastriæ, coram dicto domino rege et consilio suo comparens, clamavit ut comes Leicestriæ officium Seneschalciæ Angliæ, et ut dux Lancastriæ ad gerendum principalem gladium domini regis vocat' Curtana die coronationis ejusdem regis, et ut comes Lincoln' ad scindendum et secandum coram ipso domino rege sedente ad mensam dicto die coronationis; et quia fact' diligenti examinatione coram peritis de consilio regis de præmissis, Satis constabat eidem consilio, quòd ad ipsum ducem tanquam tenentem per legem Angliæ post mortem Blanchiæ quondam uxoris suæ pertinuit officia prædict' prout superius clamabat exercere, consideratum fuit per ipsum regem et consilium suum prædictum quòd idem dux officia prædicta per se et sufficientes deputatos suos faceret, et exerceret, et feoda debita in hoc parte obtineret. Qui quidem dux officium Seneschalciæ prædict' personaliter adimplevit," &c. (*a*)

In letters-patent made by Henry the Sixth to Richard Earl of Salisbury it was provided:—"Quod charissimus consanguineus noster Richardus, nunc comes Sarum, qui Aliciam filiam et hæredem Thomæ nuper comitis Sarum adhuc superstitem duxit in uxorem, et cum eâdem Alicià prolem tempore mortis prædictæ Thomæ habuit et habet superstitem de præsenti, eoque prætextû idem Richardus nunc comes Sarum nomen statum et honorem comitis Sarum, &c. habet, et pro tempore vitæ suæ de jure prætextû præmissorum habere debet" (*b*).

Now, although Lord Coke states the law to be that a husband could have courtesy out of an office or title of dignity, and gives the two precedents before stated, the point was several times controverted.

In 1580, Richard Bertie claimed the barony of Willoughby in right of his wife Catherine, Duchess of Suffolk, he having had issue by her. The claim was referred by Queen Elizabeth to Lord Burleigh and two commissioners, as was also the claim to the same dignity by Peregrine Bertie, the son and heir of the Duchess of Suffolk, by Richard Bertie. At one

(*a*) Co. Litt. 29 a. (*b*) Co. Litt. 29 b.

time the precedents urged on behalf of the husband were thought to have made an impression on the commissioners; but finally they made a report in favour of the son, who was accordingly admitted to the dignity in the lifetime of the father (*c*).

Notwithstanding this decision two other claims of a similar character were made shortly afterwards; one in 1586 by Sir Thomas Fane in right of his wife, who was daughter and heiress of Henry, Lord Bergavenny, and another in 1604 by Sampson Lennard in right of his wife, Margaret, Lady Dacres (*d*).

There are no known instances of any claims having been made to such courtesy since the time of Lord Coke.

Where a testator by his will directed his trustees to convey a full part of all his freehold lands to the use of his daughter for life, and so that she alone, or such person as she should appoint, should take and receive the rents and profits, and so that her husband should not intermeddle therewith, and from and after her decease in trust for the heirs of the body of the daughter; Lord Hardwicke, C., held in 1738, that this was an executory trust, that the wife took for her life only, and, therefore, that the husband was not entitled to be tenant by the courtesy. The Lord Chancellor, in his judgment, said: "It has been held in a case of a trust estate for payment of debts, and in the case of an equity of redemption, that a husband may be tenant by the courtesy; for in the case of a trust for payment of debts, it is only a chattel interest in the trustees, and the first taker has a freehold over (*e*).

According to Littleton, in order for a husband to become tenant by the courtesy, the wife must have been seised in fee simple, in fee tail, or as heiress in special tail (*f*); but it was also necessary for the wife to be solely seised both of the freehold and of the inheritance (*g*).

(*c*) Coll. Proceed. on Claims of Barony, 1—23.

(*d*) Co. Litt. by Butler, note [167].

(*e*) 1 Atk. 607.

(*f*) Litt. 35.

(*g*) Co. Litt. 183 a.

A husband might be entitled to his courtesy even though the estate out of which he took his courtesy had ceased; for example, a man could have his courtesy out of his wife's entailed estates, even though the wife and her issue were all dead, and the limitations therefore at an end.

In order for the husband to have his estate by the courtesy out of his wife's land, it was necessary that the issue he had by his wife might, by possibility, inherit; and, therefore, if lands were limited to a woman and the heirs male of her body, and she had issue only daughters, the husband had no courtesy (*h*).

A second husband could have his courtesy if by any possibility his issue might inherit, and this was so even although there were issue of the first husband still living: for this issue might all die and the issue of the second husband would then inherit (*i*).

It was also necessary that the issue should take as heir of the wife, that is, that they should take by descent; for if they took by virtue of a remainder the husband took no estate by the courtesy. Tenancy by courtesy was an excrescence out of the inheritance (*k*).

It was also necessary for the wife to be seised of the lands; if, therefore, a man died seised of lands in fee simple or fee tail general, and the lands descended to his married daughter, who had issue, and died before entry either by her or her husband, the husband was not entitled to be tenant by the courtesy (*l*). There was a difference between seisin in deed and seisin at law, for, if the wife had been only seised in law and seisin in deed could have been had, as in the beforementioned instance, the husband had no courtesy; not even if the husband had done all in his power to obtain seisin in deed for his wife. The reason was, that by the wording of the law the wife must have been absolutely possessed, *aliquam hæreditatem habentem*, and seisin at law did not give absolute

(*h*) Co. Litt. 29 b.
(*i*) Litt. 52.
(*k*) *Sumner* v. *Partridge*, 2 Atk. 47.
(*l*) Co. Litt. 29 a.

possession. However, a husband had his courtesy out of hereditaments of which the wife was only seised at law, if they were of such a character that seisin in deed was impossible; for example, in the case of an advowson (*m*); but if the advowson were appendant to a manor, and the wife were only seised at law of the manor, it would appear that the husband had no courtesy (*n*).

The seisin of the wife had to exist at some time during the coverture, *si aliquis desponsaverit aliquam hæreditatem habentem* (*o*), and, therefore, if a woman were disseised of her land, and then married and had issue, and died without having re-entered, the husband took no courtesy, for the wife had no inheritance, but only a right to the inheritance.

If a seignoress married her tenant and had issue and died, the husband was not tenant by the courtesy of the seignory, for, by the marriage, the seignory was in suspense (*p*). Neither had a husband courtesy out of his wife's estates tail after possibility of issue extinct; but if the fee simple descended to her, then the estate tail after possibility of issue extinct merged in the fee, and the husband became tenant by the courtesy.

In certain cases it was necessary that the seisin of the wife should continue until the time of the birth of issue. Thus, if a woman seised in fee of lands had issue, and afterwards committed, and was attainted of felony, still the husband was entitled to his tenancy by the courtesy; whereas, if she had committed and been attainted of felony before the birth of issue, the husband would have had no courtesy (*q*). In certain other cases it was not necessary that the wife's seisin should continue until issue were born; for example, if a man seised in fee in right of his wife was disseised before the birth of issue, and afterwards had issue, and the wife died before re-entry, the husband could re-enter and hold the land as tenant by the courtesy (*r*).

(*m*) Co. Litt. 29 a.
(*n*) Co. Litt. 29 a, note [163].
(*o*) Co. Litt. 29 a.
(*p*) Co. Litt. 29 b.
(*q*) Co. Litt. 40 a.
(*r*) Co. Litt. 30 a.

The husband's title to courtesy was initiate as soon as issue was born alive capable of inheriting.

If a woman were delivered of a monster, this was not considered as issue; but issue born deaf, dumb, or an idiot, was such issue as would entitle the husband to an estate by the courtesy (*u*). If the woman died in child-bed, and the issue was brought into the world by means of an operation at the mother's death, the husband had no courtesy, for he had no issue born during the marriage (*u*).

The statute said that the cry of the issue must have been heard in order for the husband to have his courtesy, "*cujus clamor auditus fuerit*"; but, according to Lord Coke, it was sufficient if the issue was born alive, even if it did not cry, for it might be dumb (*u*), and crying was no more evidence of the issue being alive than was breathing or moving. As soon as issue was born alive the husband's title was initiate, and he had to do homage alone, and receive homage alone during the life of the wife (*x*); for the statute said, "si ex eâ prolem habuerit, &c., habebit tota vita sua custodiam hæreditatis," but homage done by the husband before issue born did not bind the wife. On the death of the wife the husband's title to courtesy was consummate.

In the reign of Edward the Third it was decided, that if lands were given to two women and the heirs of their two bodies, and one of them married and had issue and then died, the inheritances being several the husband should be tenant by the courtesy (*y*).

In several respects the husband's tenancy by the courtesy was considered as a continuation of his wife's estate, and it was accordingly decided in 1582 (*z*), where there were three coparceners of an advowson, and they agreed to present by turns, the eldest first and so on, and the eldest died, that her husband who was tenant by the courtesy could present in the

(*u*) Co. Litt. 29 b.
(*x*) Co. Litt. 30 a.
(*y*) Co. Litt. 30 a; 17 Edw. 3, c. 51.
(*z*) *Harris* v. *Nichols*, Cro. Eliz. 18.

same way as she could have done. So, also, in the case of coparcenary, a writ *de partitione faciendâ* would lie against the tenant by the courtesy, because the coparcenary continued in him (*a*). Moreover, if the heir of the wife was an infant, he was not a ward during the life of the tenant by the courtesy, because, by the continuance of the wife's estate, the descent to the heir was interrupted.

If a husband seised of an advowson in right of his wife presented, and after presentation his wife had issue and then died, the husband had not the writ *de darrein presentment*, for he had a different estate to that upon which he first presented; for before the birth of issue he had an estate in right of his wife, but after the birth of issue he was seised for his own life as tenant by the courtesy.

If a tenant by the courtesy alienated in fee, in tail, or for the life of the alienee, the reversioner had a writ of entry *in casu consimili* by the Statute of Westminster the Second (*b*).

Previous to 1278 no action for waste could be brought against any other than the tenant by the courtesy, nor by any other than the heir at law, and consequently the heir at law had no remedy for waste against the assignee of the tenant by the courtesy, and the grantee of the reversion had no remedy for waste either against the tenant by the courtesy or his assignee. But by the Statute of Gloucester (*c*) remedy was provided for the grantee of the reversion against the tenant by the courtesy, or against his assignee if he had assigned his interest. The Act, however, made no provision as to the remedy of the heir, and consequently the tenant by the courtesy was liable to the heir's action of waste, although he had assigned his interest.

For many years it was an open question whether a widower was entitled to be tenant by the courtesy of lands which had been settled on his wife for her separate use. There were various conflicting decisions on the point, and it was not finally settled until the year 1877.

(*a*) Co. Litt. 175 a.
(*b*) 13 Edw. 1, st. 1, c. 24.
(*c*) 6 Edw. 1, c. 5.

In 1725, where lands had been devised to the separate use of a married woman without any trustees being appointed, Sir Joseph Jekyl seems to have been in doubt as to whether the husband was entitled to courtesy or not, but he remarked that though he might be tenant by the courtesy, he would be a trustee for the heirs of the wife (*d*).

In the case of *Hearle* v. *Greenbank* (*e*), where the legal estate in lands was in trustees, who held upon trust for the separate use of a married woman, Lord Hardwicke, C., held, in 1749, that the husband was not entitled to any courtesy, there being neither legal nor equitable seisin (*f*). Again, in in 1863, Sir John Romilly remarked that the fact of lands being settled on a married woman for her separate use would bar her husband's interest, including his tenancy by the courtesy (*g*).

Sir John Stuart in 1866 said, "The authorities are as clear as the principle. Real estate may be limited to the separate use of a wife, so as not to exclude entirely the husband's marital right; and, unless his marital right be wholly excluded, he is not necessarily excluded from being tenant by the courtesy. But there is no authority and no principle, contrary to the case of *Hearle* v. *Greenbank*, where it is laid down, that where there is neither legal nor equitable seisin, the husband cannot be tenant by the courtesy" (*h*).

The late Sir Richard Malins, however, in 1869, took a different view of the matter, there being a devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of a married woman, her heirs and assigns for ever, for her separate use; and the married woman having died leaving issue, he held that her husband was entitled to his estate by the courtesy (*i*). The Vice-Chancellor said, in his judgment, "The rules of this Court are clear, that the husband is entitled to courtesy whenever the wife is, at law

(*d*) *Bennet* v. *Davis*, 2 P. Wms. 317.
(*e*) 3 Atk. 695.
(*f*) 3 Atk. 716.
(*g*) *Lechmere* v. *Brotheridge*, 32 Beav. 353.
(*h*) *Moore* v. *Webster*, L. R., 3 Eq. 267.
(*i*) *Appleton* v. *Rowley*, L. R., 8 Eq. 139.

or in equity, seised of an estate of inheritance. The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation. She has died without making any disposition of the property, and was seised of the equitable estate in possession. My opinion is, that the estate is subject to courtesy. It would be contrary to every principle, that a clause introduced for the benefit and protection of the wife should prevent the husband from having his right to courtesy. The true criterion is, whether the wife is seised of an equitable estate of inheritance." And after commenting upon the decisions of Lord Hardwicke, and upon the judgment of Vice-Chancellor Stuart, before mentioned, his lordship continued: —"I think, from a review of all the cases, and upon the sound principles of law, that whenever a wife is seised of an estate in fee simple or fee tail in possession, whether legal or equitable, the husband cannot be excluded from the courtesy; he will, therefore, in this case be entitled to this estate for life by the courtesy."

The law was definitely settled in 1877 in the case of *Cooper* v. *Macdonald* (*k*). A married woman, under the limitations of a will made in 1846, was equitable tenant in tail to her separate use of certain freehold estates. By a clause in the same will she was also restrained from alienation of the rents and profits. Her husband became bankrupt, and after his order of discharge joined with his wife in barring the equitable entail, and limiting the estate in fee to the separate use of the wife. The wife died, having by her will devised the estate for the benefit of her children, and the husband's assignees claimed the husband's estate by courtesy. The Court of Appeal, affirming the decision of Sir George Jessel, M. R., held, that where a married woman had an equitable estate of inheritance to her separate use, and did not dispose of it by deed or will, her husband was entitled to courtesy; that the restraint on anticipation did not prevent the wife from barring the entail and acquiring

(*k*) 7 C. D. 288.

the equitable fee; and that the wife having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to courtesy by devising the estate. The reason given by the Master of the Rolls for so deciding in this case was that, after equity had satisfied the purposes of the separate use, which were exhausted on the death of the wife, it must follow the law, and give the husband his courtesy.

In 1829 the Real Property Commissioners suggested various alterations in the law of courtesy (*l*). They suggested that it should not be necessary for the wife to be seised in deed of her lands, but that the husband should have his estate by the courtesy if his wife had only the right of possession; and also that the birth of issue should be made unnecessary; but that where an estate should descend on a married woman, who had issue by a former marriage to which the estate would descend, the husband's courtesy should be restricted to one-half the estate. In 1831 a bill was introduced into parliament embodying these proposed reforms; but it was not passed, and consequently the old law of courtesy still applies.

In October, 1882, the question as to the effect of the Married Women's Property Act, 1882, on courtesy was discussed in an article in the Solicitors' Journal (*m*), as follows: "By the Married Women's Property Act, 1882, s. 1, the wife is enabled to acquire any property as her separate property in the same manner as if she were a *feme sole;* and by sect. 2, her real estates, if she be married after the commencement of the Act, will be her separate property. The husband, then, in such a case, during the coverture, seems to take no estate in his wife's lands. What therefore happens after the death of the wife? Can the husband be tenant by the courtesy after her death, even if he had no estate during her life? It seems from the Grand Coustumier (c. 121), that the husband is entitled to courtesy only out of the fee of which he was possessed in right of his wife. After the com-

(*l*) First Report, pp. 19 and 20. (*m*) Vol. 26, p. 737.

mencement of the Act he will be possessed of nothing in right of his wife. How, then, can he be entitled to courtesy? On the other hand, the object of the Act was, no doubt, to protect the wife, and not to alter the rights of persons entitled after her death. It does not in terms interfere with the devolution of the estate after her death, and it can hardly have been the intention of the legislature to exclude courtesy while the wife is still entitled to dower out of her husband's lands." The writer of the article leaves the question undecided, but there can be little doubt that the Act has not altered the law in this branch; it is not likely that the legislature intended to make such a radical change by mere implication, and inasmuch as the Act makes no provision for the case of undisposed-of separate property, it may be presumed that it will devolve in the same way as before the Act.

CHAPTER IX.

PARAPHERNALIA.

In Normandy the widow was entitled to her bed, her linen, and certain parts of the husband's furniture as her paraphernalia (*a*).

Paraphernalia had its origin in the necessity of overcoming the doctrine of conjugal unity; thus, in a case mentioned by Rolle (*a*), the Court agreed that a married woman "avera sa necessarie apparrell come paraphernalia, et le baron ne poet deviser eux de luy pur ceo que necessaire que el ne alera naked mes d'estre conserve del shame et del cold." According to Noy, the widow could take as her paraphernalia, "her bed, her copher, her chains, borders and jewels" (*b*). By the custom of the city of London and the province of York, the widow's paraphernalia consisted of the furniture of her bedroom and her apparel, and was known under the term of "the widow's chamber" (*c*). Lord Parker decided in 1718 that if the husband's estate exceeded 2,000*l.*, the widow could take the sum of 50*l.* in lieu of the widow's chamber (*d*).

In 1585 the judges in *Viscountess Bindon's Case* decided, that paraphernalia should be allowed to a widow according to her degree, and consequently they allowed the Viscountess to retain her jewels as paraphernalia (*e*). But it would appear from a decision of Lord Hardwicke, in 1737 (*f*), that in order for the widow to claim jewels as paraphernalia she must have worn them during the coverture. In a case before Lord

(*a*) Rolle, 1, 911.
(*b*) Noy's Maxims, 241, 9th ed.
(*c*) Bright, H. & W. vol. 1, p. 296.
(*d*) *Biddle* v. *Biddle*, 7 Vin. Abr. 201.
(*e*) Moore, 213.
(*f*) *Seymore* v. *Tresilian*, 3 Atk. 358.

Talbot (*h*), a widow claimed her gold watch and several rings, given to her at the burial of relations, as her paraphernalia, and the Lord Chancellor allowed her claim.

A widow's paraphernalia was, with one exception, in the same position as her chattels real. The difference was that the wife's chattels real survived to her free from her husband's debts, but her paraphernalia was subject to his debts. Thus Chief Baron Manwood, in *Viscountess Bindon's Case*, remarked (*i*), that "en le consideration des judges payment des debts sont d'estre p̃ferre devant allowance de jewals al ladies." However, in 1721, where a husband died leaving insufficient personalty, but sufficient realty to pay his debts, Lord Macclesfield, C., ordered the debts to be paid out of the realty in exoneration of the widow's paraphernalia (*k*), and in 1746, Lord Hardwicke, C., declared that the executors of a husband who had pledged his wife's paraphernalia ought to redeem it out of his estate (*l*). But in the same year the Lord Chancellor decided (*m*), that in case the simple contract creditors of a testator should not receive satisfaction for their debts out of the testator's personal estate, or out of his real estate, by standing in the place of the specialty creditors, then the paraphernalia of the widow, or so much thereof as would make good the deficiency, should be applied towards satisfaction of the simple contract creditors, but that the paraphernalia should not be liable to satisfy the testator's legacies. The law was the same even though the paraphernalia consisted of presents given to the widow before marriage (*n*), and it made no difference if contingent assets subsequently fell in (*o*).

Where the whole of the personal estate of a husband had been exhausted in payment of specialty debts, the widow was allowed by Lord Hardwicke, in 1746 (*m*), to stand in the

(*h*) *Mangey* v. *Hungerford*, 2 Eq. Ca. Abr. 156, margin.

(*i*) Moore, 216.

(*k*) *Tipping* v. *Tipping*, 1 P. Wms. 729.

(*l*) *Graham* v. *Londonderry*, 3 Atk. 393.

(*m*) *Snelson* v. *Corbet*, 3 Atk. 369.

(*n*) *Ridout* v. *Plymouth*, 2 Atk. 104.

(*o*) *Burton* v. *Pierpoint*, 2 P. Wms. 78.

place of the specialty creditors, as to the amount of her paraphernalia, upon the real assets of the heir at law.

In the case of *Graham* v. *Londonderry* (*q*), Lord Hardwicke remarked that presents by a stranger to a wife during her coverture were to be construed as gifts to her separate use, but that where a husband expressly gave things to his wife to be worn as ornaments of her person only, they were to be considered merely as paraphernalia, and that it was not necessary to prove that she had worn them at all times, but only upon birthdays, and other public occasions. The fact that the ornaments were in the custody of the husband made no difference, provided that the wife wore them at times, for the possession of the husband was the possession of the wife, and *vice versâ* (*r*).

Although the husband had no power of disposing of the paraphernalia by will, he could alienate it in his lifetime (*s*), for the widow's right to paraphernalia only arose when she became a widow and not before.

A widow could not claim as her paraphernalia things which were heirlooms (*t*).

To a certain extent a widow's right to obtain her paraphernalia was personal to her, and if she took no steps to obtain her paraphernalia it would not pass to her personal representative. Thus where a husband devised his wife's jewels to his wife for life, with remainder to his son, and the wife having failed to make any election or to claim them as her paraphernalia, it was held in 1691 that her administrator could not make the claim (*u*).

A married woman's right to paraphernalia might be barred by the terms of her marriage settlement; thus where a woman by her marriage articles agreed to have no part of her husband's personal estate, but what he should give her by will,

(*q*) 3 Atk. 393.

(*r*) *Northey* v. *Northey*, 2 Atk. 77.

(*s*) 2 Black. Com. 436.

(*t*) *Calmady* v. *Calmady*, 11 Vin. Abr. 181, 21; *Jervois* v. *Jervois*, 17 Beav. 566.

(*u*) *Clarges* v. *Albermarle*, 2 Vern. 245.

it was held, in 1688, that this barred her of her paraphernalia (*x*).

As before mentioned, Lord Hardwicke decided in the case of *Graham* v. *Londonderry* (*y*), that if a relative or friend gave to a married woman, either before or after marriage, a gift of such things as usually constituted paraphernalia, they were to be held for her as her separate property, and were not paraphernalia. Some doubt was thrown on this principle by a decision of Lord Coleridge, C. J., in the early part of 1882 (*z*). By an ante-nuptial settlement it was agreed that all property coming to the wife, or to her husband in her right, during the coverture, should be vested in two trustees, except jewels, which were to be for her separate use. The wife was possessed of certain jewels, which had been given to her before marriage. An ante-nuptial creditor claimed to have her debt paid out of the jewels, contending that they were her separate property, but the Lord Chief Justice informed the jury, that by law the jewels and other articles were the property of the husband. However, on appeal, Sir George Jessel, M. R., and Lord Justice Lindley, held that the jewels were the separate property of the wife, and therefore were subject to her ante-nuptial debts.

Since the passing of the Married Women's Property Act, 1870, any property of the nature of paraphernalia coming to a married woman under the provisions of the Act, has been her separate property; and by the Married Women's Property Act, 1882, property of the nature of paraphernalia belonging to a woman married on or after the 1st of January, 1883, or accruing on or after that date, to a woman married before that date, will be her separate property, free from the incidents formerly attaching to paraphernalia.

(*x*) *Cholmeley* v. *Cholmeley*, 2 Vern. 82.

(*y*) 3 Atk. 394.

(*z*) *Williams* v. *Mercier*, 9 Q. B. D. 337.

CHAPTER X.

PIN-MONEY.

PIN-MONEY may be defined as the yearly provision settled on, or allowance made to, a wife for her personal apparel, decoration, or ornament (*a*).

There is this difference between paraphernalia and pin-money; a woman is only entitled to her paraphernalia on the death of her husband, whereas she is entitled to her pin-money during the coverture.

If a wife survived her husband she could not claim more than one year's arrears of pin-money (*b*), for if a woman allowed her pin-money to run in arrear, and during the period of the pin-money being unpaid she was supported by her husband, it was presumed that she had waived her right to the pin-money in consideration of being supported. But formerly it was a presumption only, and might be rebutted. Thus, in 1749, in the case of *Aston* v. *Aston* (*c*), Lord Hardwicke, after remarking that arrears of pin-money should not be allowed for more than one year, said:—"But that is not merely on a supposal of her having given them up to the husband, but on this, that, having lived with the husband, she is supposed to have received satisfaction that way. But where the wife lived separate from the husband (which was the case of Lady Derby), and had no allowance from him, the Court would decree an account as far back as the arrears go, because there could be no such presumption." And, again, where a married woman had 300*l.* per annum settled on her for pin-money, and for many years previous to her husband's death

(*a*) *Joddrel* v. *Joddrel*, 9 Beav. 45; *Howard* v. *Digby*, 2 Cl. & Fin. 658; 2 Bright, H. & W. 288.

(*b*) *Peacock* v. *Monk*, 2 Ves. sen. 191.

(*c*) 1 Ves. sen. 264.

he only paid her 200*l.* per annum, and, on her objecting, told her that she would have it at last, Lord Hardwicke, C., said, in 1738 (*d*), when the question arose as to whether the wife was entitled to have the arrears of her pin-money:—"I allow that it is a general rule when a wife accepts a payment short of what she is entitled to, or lets the husband receive what she has a right to receive to her separate use; it implies a consent in the wife to submit to such a method where the husband and wife have cohabited together for any time after; but here is no pretence that the pin-money was departed from by the wife, for there is evidence of several payments *eo nomine;* and though a wife may come to an agreement with her husband in relation to anything she is entitled to separately, yet this does not amount to a new agreement, for here was a promise she should have it at last, which was an undertaking to pay the arrears. She is therefore entitled to have the arrears of her pin-money raised by the trustees out of the estate, which was by settlement charged with it."

If, however, the provision was expressed to be made for particular purposes, as for the wife's apparel or private expenses, and they were provided for by the husband, this circumstance barred the wife from claiming any arrears of pin-money, which otherwise might have been due at the decease of the husband, for this would have been considered a payment or satisfaction by the husband (*e*).

Thus, Lord Macclesfield said, in 1722 (*f*), that if there were a provision for the wife's separate use for clothes, and the husband provided the clothes, the wife's claim would be thereby barred. Again, in a case decided in 1725 (*g*), pin-money of 50*l.* per annum was reserved for a wife by her marriage settlement for her apparel and private expenses. The husband died, and soon after the widow died, upon which her executors demanded in equity 500*l.* for ten years' arrears of this pin-money; but it appearing that the husband maintained her, and, on the other hand, there being no proof that

(*d*) *Ridout* v. *Lewis*, 1 Atk. 269. Wms. 84.
(*e*) Roper, vol. 2, p. 133.
(*f*) *Powell* v. *Hankey*, 2 P. Wms. 341.
(*g*) *Thomas* v. *Bennet*, 2 P.

she had ever demanded the pin-money, Lord King disallowed the claim. And in 1735 Lord Talbot said (*h*) that, where pin-money was secured to a wife, and it appeared that the husband, notwithstanding, provided the wife with clothes, and other necessaries, this, during such time as the wife was so provided for by the husband, would be a bar to any demand for arrears of pin-money.

Lord Brougham, in deciding the case of *Howard* v. *Digby* (*i*), in 1834, said:—Pin-money "is not a gift from the husband to the wife out-and-out. It is not to be considered like money set apart for the sole and separate use of the wife during the coverture, excluding a *jus mariti*, but it is a sum set apart for a specific purpose. Pin-money is, with respect to the personal expense of the wife, for the dress and the pocket-money of the wife: from its very name there is a connection with the person. It means that which goes to deck or attire the person of the wife, and, as I should say, upon a somewhat larger construction, to pay her ordinary personal expenses. . . . It is wonderful how little there is to be found upon the subject of pin-money, notwithstanding its occurring almost every time that a marriage takes place among persons of large fortune. You cannot even get a definition from the books upon which you can rely; you cannot trace the line which divides it from the separate property of the wife with any distinctness, or in any way on which you can depend; and as to authority either of decisions or dicta of text writers, or *obiter dicta* of judges, there is nothing that furnishes a clear and steady light on the subject, the cases running from pin-money into separate estate, and from separate estate into pin-money. . . . Pin-money was meant, not for the sustentation of the wife, but for the dress and ornament of the wife, in a station suitable to the degree of the husband. . . . I will not go so far as to say—because it is not necessary for the purpose of this argument—that the husband might hold back her pin-money if she did not attire herself in a becoming way. I should not be afraid, however,

(*h*) *Fowler* v. *Fowler*, 3 P. Wms. 355.

(*i*) 2 Cl. & Fin. 634; 8 Bli., N. S. 224.

of stretching the proposition to that extent." And the Lord Chancellor decided that if pin-money fell into arrear it could not be recovered by the wife's representatives, and added:— "It is an error to suppose that the ground on which the Court of Chancery would refuse to go back a year is only because of the supposed satisfaction or acquiescence; that is not the sole reason. The Court refuses to go back for this obvious reason, that the money is meant to dress the wife so as to keep up the dignity of the husband, not for the mere accumulation of the fund" (*k*).

The Married Women's Property Act of 1870 made no provision as to pin-money, and the only effect of the Act on pin-money was to render it less important; and by the 19th section of the Married Women's Property Act of 1882 it was specially provided that nothing in the Act should interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman. Therefore, pin-money, being a yearly allowance provided by settlement, remains subject to the old law.

(*k*) 8 Bli., N. S. 249.

CHAPTER XI.

SEPARATE ESTATE.

THE present doctrine of separate estate is of recent origin and growth; yet, notwithstanding this, various instances can be found where the doctrine of separate estate, or something analogous thereto, was evidently recognized in early days.

According to Sir John Davies, the Attorney-General for Ireland, in the reign of James the First, "Les femes des Irish seigniors ou chieftaines, claimond de aver sole propertie en certaine portion de biens durant le coverture, oue power de disposer tiels biens sans le assent de lour barons." This would appear to have been a claim made by the Irish wives under some ancient custom; however, it was resolved and declared unanimously by the judges in 1605, that the property of such goods should be adjudged to be in the husbands and not in the wives, according to the common law in such cases (*a*). The Welch law seems to have allowed the wife three kinds of property, each of which was in the nature of separate estate, namely, her Cowyll, her Gowyn, and her Saraad, and these could not be taken from her for any cause. Her Cowyll was what she received for her maidenhood. Her Saraad was what she recovered for every beating given to her by her husband, except for three things. The three things for which she might be beaten were, for giving away anything which she ought not to have given away, for being detected with another man in a covert, and for wishing drivel upon her husband's beard; but if for being found with another man the husband chastised her, he had no other satisfaction; for it was not considered proper that he should have both satisfaction and vengeance for the same crime. The wife's Gowyn

(*a*) Davies' Rep. 50.

was what she could recover in the case of her husband's infidelity; if she detected her husband with another woman her Gowyn was six score pence for the first offence, one pound for the second, and for the third, separation, without losing anything that belonged to her. The property the wife might obtain from the above three things belonged to her apart from her husband (*b*).

Dr. Lingard, in his History of the Anglo-Saxon Church, says (*c*), that it is clear that the Anglo-Saxon husband and wife held separate estates during marriage; and in Kemble's Codex Diplomaticus instances are given where the wife disposed of her property without the intervention of her husband; clearly showing that the Anglo-Saxon wife had a separate estate of her own, although no doubt called by another name.

The Anglo-Saxon wife's separate estate, whatever it may have been, entirely disappeared after the Norman Conquest, and it is not until the reign of Elizabeth that any traces of its re-appearance can be found.

In 1581 a married woman joined her husband in the sale of part of her inheritance, and subsequently, on account of discord, she and her husband separated. £100, part of the money received for the sale of the lands, was allotted to her for her maintenance, and was placed in the hands of one Nicholas Mine, and bonds were given for the payment thereof unto Henry Golding to the use of the married woman. On the death of Henry Golding the bonds came to the hands of his administrator, who refused to deliver the same to the married woman, who thereupon claimed relief of the Court of Chancery. The administrator demurred in law, on the ground that the married woman sued without her husband, but the Court gave judgment in her favour (*d*). This would appear to have been the first case in which the wife's separate estate was recognized, but the principle, once established, quickly developed. Thus, where money was given to a *feme*

(*b*) Ancient Laws and Institutes of Wales, Venedotian Code, bk. 2, ch. 1, sect. 39.

(*c*) Vol. 2, p. 8, n.

(*d*) *Mary Sankey* alias *Walgrave* v. *Golding*, Cary, 124.

covert for her maintenance, on account of her husband being a spendthrift, and the husband claimed the money in 1624, the Court of Chancery declared that the money belonged to the wife and not to the husband (*e*).

A married woman who had stock for her own use died, and was buried by a friend without the direction of her husband, and the Court of Chancery, in 1638, held, that the expenses of burying her were to be paid by the friend who buried her, and not by the husband (*f*); and in 1639, where a married woman who was separated from her husband and had an allowance of 200*l.* a year disposed of it by will, the Court of Chancery held, "that for things in action, or upon a trust, a *feme covert* might by will dispose of the same without the assent of her husband" (*g*).

Now, although it was clearly settled that a married woman might institute a suit against a third person without making her husband a party, it was some time before she could institute a suit against her husband. Such suits became necessary in cases of ante-nuptial settlements made without the intervention of trustees. Such settlements usually took the form of contract by the husband with his intended wife, either to give her a certain provision at his death, or to allow her a certain amount during the coverture; and the question arose as to what was the effect of marriage on such a contract, and whether the contract was extinguished by the marriage or not.

The first of these points—namely, where the husband contracted to leave his wife a sum of money at his death—was decided in 1618. A husband promised to leave his intended wife worth 100*l.* at his death, but failed to do so, and it was held by the majority of the judges, Lord Hobart dissenting, that the contract of the husband was not destroyed by the marriage, because it was one that could not be performed during the coverture (*h*). The point again arose in 1620,

(*e*) *Fleshward* v. *Jackson*, Tothill (Holborne's edition), 158.

(*f*) *Poole* v. *Harrington*, Tothill, 161.

(*g*) *Gorge* v. *Chansey*, Rep. in Chan. 67.

(*h*) *Smith* v. *Stafford*, Hob. 216.

where a husband had promised to leave his wife worth 500*l.*, and it was unanimously decided in a similar manner (*i*).

Where, however, the husband had contracted to allow his intended wife a sum of money during the coverture, the Courts held that the contract was extinguished by the marriage, the effect of marriage on such a contract being to revest the interest of the wife under the contract in the husband. This point was first decided in 1631 in the case of *The Earl of Suffolk* v. *Greenvill* (*k*). The defendant, the Lady Greenvill, whilst sole, had a decree against the Earl of Suffolk, the plaintiff, for 600*l.* per annum, against which decree the Earl prayed to be relieved, in respect of a deed of assignment of the benefit of that decree made by her ladyship before marriage to one Cutford in pursuance of a verbal agreement between Sir Richard Greenvill and Lady Greenvill, before their marriage, that the said lady should have the sole power and disposal of the said 600*l.* per annum after coverture, the plaintiff suggesting that the said lady and the said Cutford had released to him. But the Court, consisting of the Lord Keeper and Justices Hutton and Whitlock, declared that they had materially considered the points in question, and did agree that there was not sufficient matter or proof to bar the defendant, Sir Richard Greenvill, of the benefit of the decree, or to relieve the plaintiff; for that the arrears of the 600*l.* per annum decreed to Lady Greenvill, being in its nature a chose in action, could not by law be assigned over; wherefore the assignment to Cutford, even though proved, would have been void in law, and, being so, ought not to be maintained in a Court of equity (no consideration appearing to support the same, which should make it better in equity than at law), and for Sir Richard's verbal agreement in consideration of marriage to be had, it was no good consideration, being in subversion of the grounds of law, and of the rights of marriage, and not sufficient in a Court of equity to ground a decree. The case of *The Earl of Suffolk* v. *Greenvill* was cited

(*i*) *Clarke* v. *Thompson*, Cro. Jac. 571.

(*k*) *Theophilum Com' Suffolk* v. *Ri. Greenvill, Mil. & Baronettum, & Mar. ux' ejus*, Freeman, Chan. 146.

and followed in *Dacres* v. *Chute* in 1663 (*l*). In this case the plaintiff being a widow, and having 700*l.* per annum jointure, the defendant, Chute's father, made a suit to marry her; but before marriage it was agreed by writing between them that it should be lawful for her, or such as she should appoint, during the coverture, to receive and dispose of the rents of her jointure, as she pleased. The defendant Houghton was employed by her to collect the rents, and he paid them to Mr. Chute by the plaintiff's approbation. Mr. Chute, after ten years, died, and left the defendant Chute, his son, his executor, against whom and the said Houghton, the plaintiff exhibited her bill, alleging 1,000*l.*, parcel of the said rent, to be in Houghton's hands. Whereupon it was decreed by the Lord Chancellor and the Master of the Rolls that the said agreement being made between the said Mr. Chute and the plaintiff was extinguished by the marriage.

The right of a married woman to sue seems to have been first recognised in cases where she was separated and living apart from her husband. Thus, in 1639, in the case of *Roe* v. *Newburgh* (*m*), the Court held that a *feme covert* could not sue, unless there were a severance. The suit was for a promise to marry; after twenty years, the matter was dismissed, because the plaintiff could not find precedents suiting to the case. However, it was not long before a married woman was enabled to institute a suit with regard to her separate estate by means of the intervention of a next friend, and the suit could be so instituted not only against a third person but also against her husband.

In the case of *Haymer* v. *Haymer* (*n*), decided by the Court of Chancery, in 1679, the late husband of the plaintiff, before their marriage, had entered into articles with the plaintiff whereby it was agreed, that certain of his lands should be settled before the marriage should be solemnized, upon him and the plaintiff, and the heirs of his body by the plaintiff, but the husband died before the settlement was made. In

(*l*) Freeman, Chan. 148.
(*m*) Tothill, 161.
(*n*) 2 Ventris, 343.

pursuance of the said articles the plaintiff married him, and after his decease she exhibited her bill to have the articles executed. The objection taken was that the marriage operated as a waiver of the benefit of the articles, but it was decreed, the lands being in mortgage to one that had no notice of the articles, "that the plaintiff should redeem and hold for her life, and that her executors should detain the land till the money was raised that she had been out upon the redemption" (*o*).

In the case of *Furson* v. *Penton* (*p*), which came before the Master of the Rolls, in 1686, a man before marriage covenanted with his intended wife, that she should have power to dispose of 300*l.* of her estate, notwithstanding the intermarriage. After the marriage the husband brought his bill against the defendant in whose hands the 300*l.* was, claiming that if there was any such agreement with his wife, the same was discharged by the intermarriage. The Master of the Rolls "inclined to dismiss the bill: but then the plaintiff's counsel alleging that the wife was consenting that the money should be paid to the husband, the Court adjourned the cause till next term, when the plaintiff might bring his wife into Court to be examined."

In *Drake* v. *Storr* (*q*), decided by Lord Somers, C., in 1695, a man upon a treaty of marriage gave a bond to his intended wife, conditioned that if he did permit her to dispose of 100*l.* then the bond should be void; the Lord Chancellor held this to be a good agreement, and decreed that the husband should give a bond to trustees with the same condition.

In 1712, in the case of *Mitchell* v. *Mitchell* (*r*), where there was a gift by a husband to his wife after marriage, without the intervention of trustees, it was held good in equity.

In all the cases decided before 1710, the separate estate had been created by means of trustees, but in that year a case occurred where no trustees had been appointed (*s*). A testator

(*o*) *Sic.*
(*p*) 1 Vern. 408.
(*q*) Freeman, Chan. 205.
(*r*) Bunbury, 207, margin.
(*s*) *Harvey* v. *Harvey*, 1 P. Wms. 124.

having a married daughter, by his will devised his personal estate to her, to hold to her particular and separate use. Afterwards the husband (part of his personal estate consisting of a mortgage) agreed by writing under his hand, that the wife should enjoy it to her separate use. The question arose (there being no trustees to whom the devise was made) whether the wife could enjoy this personal estate without its being intermeddled with by the husband. Lord Cowper, C., remarked, "This is a great question, whether the husband shall be compelled to let the wife enjoy this personal estate to her own use," but the reports (*t*) do not say what the Lord Chancellor's decision was. The point again arose in 1722, before Lord Macclesfield, C., in the case of *Burton* v. *Pierrepoint* (*u*), in which the Lord Chancellor decided, that dowry-money could not be part of a married woman's separate estate, "it being given to herself, and not to her trustee, and the wife cannot have a separate property in a personal thing without a trustee."

The law on this point was finally settled by Sir Joseph Jekyl, M. R., in 1725, in the case of *Bennet* v. *Davis* (*x*). In this case a testator, whose daughter was married to one Bennet, a tradesman in London, who was extravagant and in debt, made his will and devised certain freeholds to his said daughter for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and so that her husband should not be tenant by the courtesy, nor have the lands for his life, in case he survived, but that they should upon the wife's death go to her heirs. Soon after this, the testator died, and Bennet, the husband, becoming a bankrupt, the commissioners assigned the lands to the defendant Davis in trust for the creditors; and upon Davis's bringing his ejectment, the bankrupt's wife, by her next friend, preferred her bill against Davis, the assignee, and her husband, in order to compel them to assign over the estate to her separate use. It was objected on behalf of the defendant (*inter alia*) that

(*t*) 1 P. Wms. 125; 2 Vern. 659.

(*u*) 2 P. Wms. 79.

(*x*) 2 P. Wms. 316.

though the testator might intend these lands for the separate use of the daughter, yet that such his intention was not executed according to law; forasmuch as by law, the husband during the coverture was entitled to the wife's estate in her right; and though the testator might have devised the premises to trustees for the separate use of the wife, yet the question now was, not upon what he might have done, but upon what in fact he had done. The before-mentioned case of *Harvey* v. *Harvey* was cited, and it was urged, that the case of a devise of a legacy, or of a term to the wife for her separate use might be good, because these remained in the executor until assent, and equity would not compel the executor to assent, whereby the intention of the testator should be disappointed, but would continue the executor a trustee for the *feme covert;* whereas in the present case, the devise being of lands in fee to the wife herself, who, by virtue of the will only, had an immediate title thereto, the husband must consequently be entitled to the profits in her right, and it would be repugnant to the law to say, that he should not take the profits; and further, that here there was no trust, the testator never having intended to trust the husband, and the wife could not be a trustee for herself; besides, the husband could not properly be a trustee for the wife, they both being but one person. But the Master of the Rolls "took it to be a clear case that it was a trust in the husband, and that there was no difference, where the trust was created by the act of the party and where, by the act of law. . . . . There being an apparent intention and express declaration, that the wife should enjoy these lands to her separate use, by that means, the husband, who would otherwise be entitled to take the profits in his own right during the coverture, was now debarred, and made a trustee for his wife. And admitting the husband to be a trustee, then the argument of the creditors having the law on their side was immaterial; . . . . and that in this case, though the husband might be tenant by the courtesy, yet he should be a trustee for the heirs of the wife. Also that when the testator had a power to devise the premises to trustees for the separate use of the wife, the Court,

in compliance with his declared intention, will supply the want of them, and make the husband trustee." This decision of Sir Joseph Jekyl placed the separate estate of married women on a firm basis.

The object of the principle of the doctrine of separate estate, was to make the wife independent of her husband, and to give her as far as possible a distinct *persona* with regard to her own property. The doctrine of separate estate succeeded in so far as it freed the wife from her husband's legal control, but it was no protection against what may be shortly called the marital influence. Of what avail could the principles of separate estate be against the seductive persuasions of the tongue or the lips, or the forcible arguments of the poker or the boot? In order to protect the wife against the marital control, it was necessary to place a fetter on the wife's power of disposition, and to make it impossible for the wife to dispose of her property whether she wished it or not.

In 1778 it was decided by Lord Thurlow, C. (*y*), that if property was merely settled on a married woman for her separate use this would not fetter her power of disposition. In the case of *Pybus* v. *Smith* (*z*), decided by the same Lord Chancellor in 1791, property was limited to the separate use of a married woman, and the income was made payable unto such persons, and in such shares and proportions, and to and for such uses, intents, and purposes as the married woman should by any writing or writings under her hand, direct and appoint, but it was again decided that the married woman could dispose of her interest. Lord Thurlow, in his decision, remarked that if it was the intention of a parent to give a provision to a child in such a way that she could not alienate it, he saw no objection to its being done; but such intention must be expressed in clear terms. The hint thus thrown out was shortly afterwards acted upon, for, says Mr. Lewin, "Lord Thurlow happened to be nominated a trustee of Miss Watson's settlement, and he directed the insertion of the

(*y*) *Hulme* v. *Tenant*, 1 Bro. C. C. 16.

(*z*) 3 Bro. C. C. 340.

words 'and not by anticipation,' from which time this has been the usual formulary, and the effect of it for the purpose of excluding the power of disposition has never been questioned."

The restraint against anticipation being opposed to one of the leading principles of law—namely, the full power of disposition over property—the Courts were careful to prevent it applying when the circumstances for which it had been created had ceased, and the necessity of the restraint was done away with. Thus, in 1815, where property was settled on a married woman without power of disposition, and the coverture having ceased, it was held by Sir William Grant, M. R., that the woman, having become discovert, might dispose of her interest (*a*); and it was similarly decided by Sir Thomas Plumer in 1822 (*b*). The point again arose in 1831 in the case of *Woodmeston* v. *Walker* (*c*). Here a testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, without power of anticipation. Sir John Leach, M. R., upon the ground that the restraint against anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. However, Lord Brougham, on appeal, held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation. The Lord Chancellor, in his judgment, remarked:—"It was said that the woman might have the property at her own disposal till she married, and that when that event happened a sort of postponed fetter might attach, a fetter which would fall off upon her husband's death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate. Nor is it easy to conceive by what process or contrivance it could be

(*a*) *Jones* v. *Salter*, 2 R. & M. 208.

(*b*) *Barton* v. *Briscoe*, Jacob, 603.

(*c*) 2 R. & M. 197.

effectually created, unless, perhaps, by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures. But it is unnecessary to consider that question, as no contrivance has been resorted to in this case." But the question arose three years afterwards before Lord Cottenham, then Sir C. Pepys, M. R., in the case of *Massey* v. *Parker* (*d*), where a testatrix left her residuary property to the separate use of two granddaughters without power of anticipation, one of whom married after the death of the testatrix, and her husband became insolvent. The Master of the Rolls said:—"The question is, whether, where such fetters are attempted to be imposed upon an unmarried female legatee, and she marries without obtaining payment of the fund, such fetters are to operate during the coverture. Why were they inoperative before the marriage? Because they were inconsistent with the nature of her estate. Her estate and interest were therefore absolute before marriage, and the trustee held the legacy for her absolutely. She might have taken it herself, or have given it to anyone; and why may she not, by the act of marriage, give it to her husband? .... I am of opinion that the husband did obtain an interest in his wife's legacy" (*e*).

"The doctrine promulgated in this case," said Mr. Wigram, when arguing the case of *Scarborough* v. *Borman* (*f*) in 1839, "created great alarm in the profession, and particularly amongst conveyancers, whose practice, evidencing as it does what the law was and is, has from time immemorial been to limit property to the separate use of a woman, without reference to the circumstance of her being at the time single, or under coverture."

The point again arose in 1838 in the case of *Tullett* v. *Armstrong* (*g*), before Lord Langdale, who had succeeded Lord Cottenham as Master of the Rolls, and he decided in opposition to the before-mentioned decision of his predecessor, that if property were given or settled to the separate use of a

(*d*) 2 M. & K. 174.
(*e*) page 183.
(*f*) 4 M. & Cr. 385.
(*g*) 1 Beav. 1.

woman unmarried when the settlement or gift took effect, and she were prohibited against anticipating it, it would, if not alienated by her, when discovert, be enjoyed by her as her separate estate during any coverture or covertures to which she might afterwards be subject; and that she would, during the existence of such coverture or covertures be unable to anticipate it. This decision was appealed against, but was affirmed by Lord Cottenham in 1840 in an elaborate judgment (*h*), in which he practically reversed the decision in *Massey* v. *Parker*, and did his best, as he said, to dissipate the alarm which had prevailed, lest the separate estate should be held not to exist at all during the subsequent coverture, or, what would in his opinion be in many cases a greater evil, that it should exist without the protection of the clause against alienation (*i*).

Some remarks must be made on *Sir Edward Turner's Case*, decided by the House of Lords in 1681. The reports of this case are so meagre that it is impossible to say with any certainty whether it involved the question of separate use or not. Mr. Macqueen seems to think that it did. According to a memorandum of the case given by Vernon in his Reports (*k*), it was adjudged, in an appeal in the House of Lords, "that a term being assigned in trust for a *feme* by her former husband, and she afterwards intermarrying with the late Lord Chief Baron Turner, who aliened the term, that the same was well passed away, and that the husband might dispose thereof; and my Lord Chancellor's (Lord Nottingham's) decree was thereupon reversed. But it was agreed that where a term is assigned in trust for a *feme* by the privity and consent of her husband, there without doubt, the husband cannot intermeddle or dispose of it."

In the case of *Tudor* v. *Samyne* (*l*), according to the report, a married woman's first husband, being possessed of a term of thirty-one years, conveyed it over to trustees for the separate use and benefit of the married woman. The woman married a second husband, who first mortgaged the term,

(*h*) 4 M. & C. 377.
(*i*) page 407.
(*k*) 1 Vern. 7.
(*l*) 2 Vern. 270.

and subsequently he and the mortgagee assigned the term to the plaintiff. A bill was brought against the wife and her trustees to compel them to assign over the legal estate to the plaintiff. And it was decreed accordingly; for as the husband might dispose of a term for years where the legal estate was in his wife, so he might of a trust of a term, without either the wife or the trustees joining; and *Sir Edward Turner's Case* was cited as an authority that a term assigned by the first husband for the separate use of the wife might be sold or disposed of by the second husband. It would thus seem clear that the doctrine of separate use was involved in these cases, but in a note to Mylne and Craig's report of the case of *Scarborough* v. *Borman* (*m*) it is stated as follows:—"The reporters are informed by Mr. T. S. Clarke that he extracted, for the use of the Lord Chancellor, the facts of the case of *Tudor* v. *Samyne*, as they appear in Reg. Lib. B, 1691, fol. 530, 531, and from that extract, with which he has favoured the reporters, it appears that the settlement of the leasehold property upon which the defendant Editha Samyne relied was stated by her answer to be a settlement made by her former husband, Dr. Sermon, by assigning the leasehold estate to trustees, in trust to permit Dr. Sermon and the defendant, his then wife, to receive the rents and profits for the remainder of the term, if they lived so long, and after their death to permit their children, if any, to receive the same during the aforesaid term. It appeared, also, that Dr. Sermon, at his death, left a son by the defendant, who was still living. It would seem, therefore, that the property in question was not settled to the wife's separate use at all."

The question is more one of interest than of importance, for, whether the cases involved the doctrine of separate use or not, the decisions had no lasting effect on the growth of the doctrine. More will be said about *Sir Edward Turner's Case* when treating the subject of the wife's equity to a settlement.

(*m*) 4 M. & C. 389, n. (*c*).

The next point to be noticed in the history of the wife's separate estate is the growth of the right of alienation.

As before stated, it was held, in 1639, that where a woman who was separated from her husband had an allowance of 200*l.* a year, she could dispose of it (or, rather, of the accumulations) by will without the assent of her husband (*n*).

In 1751, Lord Hardwicke remarked, in the case of *Peacock* v. *Monk* (*o*), "As to personalty, undoubtedly, where there is an agreement between husband and wife before marriage that the wife shall have to her separate use either the whole or particular parts, she may dispose of it by an act in her life or will; she may do it by either, though nothing is said of the manner of disposing of it." This case did not decide whether the wife would have a similar power if there was no such ante-nuptial agreement. The point, however, arose before Lord Thurlow, C., in 1789 (*p*), and was decided in the affirmative. "I have always thought it settled," said the Lord Chancellor, "that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it."

The growth of the wife's power of disposition over her separate estate received slight checks in two decisions of Lord Rosslyn, C. In 1798, he held that a married woman could not dispose of her separate estate in favour of her husband (*q*); and in 1800, that she could not grant an annuity out of her separate estate (*r*). These cases, however, were not followed, Lord Eldon, C., holding, in 1805, that a wife could dispose of her separate property in favour of her husband (*s*), and Sir William Grant, M. R., in 1808, that she could grant an annuity out of her separate estate (*t*). In

(*n*) *Gorge* v. *Chansey*, Rep. in Chan. 67.

(*o*) 2 Ves. sen. 191.

(*p*) *Fettiplace* v. *Gorges*, 1 Ves. 46.

(*q*) *Whistler* v. *Newman*, 4 Ves. 129.

(*r*) *Mores* v. *Huish*, 5 Ves. 692.

(*s*) *Parkes* v. *White*, 11 Ves. 222.

(*t*) *Essex* v. *Atkins*, 14 Ves. 542.

1806, the same judge held that a married woman might dispose of her reversionary separate estate (*u*).

In all these cases the wife's separate property consisted of personalty; it was a long time before the question of the wife's power of disposition over her separate realty was determined.

The point arose, in 1851, in the case of *Harris* v. *Mott* (*x*). A married woman having real property settled on her for her separate use, entered into a contract for sale, and died, having by her will devised the estate to her husband, who sued for specific performance. The purchaser objected that the *feme covert* had neither power to enter into a contract nor to devise the estate. Sir John Romilly, M.R., said:—"The object of limiting the estate to her separate use was to protect her from her husband, and not to extend her power of disposition. If any distinct authority could be produced I must act on it, but none being cited I think the case too doubtful to compel the defendant to take the title in the absence of the heir. I cannot, in his absence, determine that he is a mere trustee of the legal estate." The question was finally settled by Lord Westbury, C., in 1865, in the case of *Taylor* v. *Meads* (*y*). The Lord Chancellor, in 1862, foreshadowed his decision, so far as it related to the power of disposition by will, when he remarked that, "By means of a power or under a trust, as in the case of separate estate, a married woman might, by a writing in the nature of a will, dispose of real and personal estate (*z*). In the case of *Taylor* v. *Meads*, a married woman had a special power of appointment over certain freehold property, which, in default of such appointment, was settled upon trust for the married woman, for her sole and separate use. She never formally executed the power, but by her will, executed in 1845, with the formalities required by the Wills Act, she gave and devised all her real and personal estate over which she had a disposing power to her husband and his

(*u*) *Sturgis* v. *Corp*, 13 Ves. 190.

(*x*) 14 Beav. 169.

(*y*) 4 De G., J. & S. 597.

(*z*) *Thomas* v. *Jones*, 1 De G., J. & S. 81.

heirs. Sir John Romilly, M.R., held that her will operated as a valid execution of the power of appointment, but abstained from giving any opinion upon the second question raised in the argument, namely, whether the married woman had not a power of disposition over the property by will in default of her exercise of the special power of appointment by virtue of her separate estate in the property, and as an incident to that separate estate. On appeal, Lord Westbury reversed the decision of the Master of the Rolls, holding that there was no valid execution of the power of appointment, but that the married woman had power of disposition over her separate realty, as though she were a *feme sole*. The Lord Chancellor, after directing that the judgment of the Master of the Rolls should be reversed, continued (*a*) :—"This gives rise to the next question, upon which there has been no decision in the Court below, namely, whether in a case where real estates are conveyed or devised to trustees in fee, upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme sole*. Can she convey the equitable fee without the necessity of the instrument being acknowledged in the manner required by the Statute for the Abolition of Fines and Recoveries? And can she, during the coverture, devise the equitable estate by a will executed in conformity with the statute? There is no difficulty as to the principle. When the Courts of equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of, and free from the control and interference of her husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers

(*a*) 4 De G., J. & S. 603.

of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole lies between the married woman and her trustees; and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate, according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; and when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete, both at law and in equity. . . . I must hold, therefore, that a *feme covert* where not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos*, or will."

The wife's power of disposition over her separate property, having been once determined, it followed as a natural consequence that a married woman's creditors could come against her separate property for the payment of their debts.

In 1751, Lord Hardwicke, C., remarked (*b*), "If a wife, having an estate to her separate use, borrows money, which she gives a bond to pay under hand, this would give a foundation to demand the money against her out of her separate estate, she being considered as a *feme sole* as to that," thus showing that in his opinion the separate estate would be liable, although at the time of entering into the bond, the separate estate was not specifically charged with the repayment of the debt. This opinion was followed by Lord Thurlow, C., in 1778, in the case of *Hulme* v. *Tenant* (*c*),

(*b*) *Peacock* v. *Monk*, 2 Ves. sen. 193. (*c*) 1 Bro. C. C. 16.

where he held that a wife's separate property was liable for the repayment of money secured by her bond, although the bond made no reference to the separate estate. He remarked —"I have no doubt about this principle, that, if a Court of equity says a *feme covert* may have a separate estate, the Court will bind her to the whole extent as to making that estate liable to her own engagements, as, for instance, for payment of debts."

Lord Eldon repeatedly expressed doubts upon the propriety of this decision, and of those on which it was founded, calling the principal case "a prodigiously strong one," and intimating not only that the authority of those cases had been considerably shaken by his predecessor, Lord Rosslyn, in *Whistler* v. *Newman* (*d*), but that there might be a contrary decision if the point should come distinctly into full review. Notwithstanding these grave doubts, and the concurrence of other judges as to the principle of them, the Courts did not decide the point contrary to the decision of Lord Thurlow. Indeed, the point arose, and was determined in a similar manner by Sir William Grant, M.R., in the case of *Heatley* v. *Thomas* (*e*); and the same judge, in 1810 (*f*), extended the principle still further, and held that a married woman's separate estate was liable for a debt secured by her promissory note.

In 1793, the Courts had to decide what kind of contract would be binding against the separate estate of a married woman, and Lord Rosslyn held that a general creditor could not come into equity to have his debt satisfied out of the separate estate (*g*), and this decision was followed by Lord Eldon, C., in 1804 (*h*). But in 1834, Lord Brougham held that the separate estate of a *feme covert* was liable in equity to her general engagements, as well upon an implied undertaking as by a written obligation (*i*); and in 1840, Lord Cotten-

(*d*) 4 Ves. 129.
(*e*) 15 Ves. 596.
(*f*) *Bullpin* v. *Clarke*, 17 Ves. 365.
(*g*) *Duke of Bolton* v. *Williams*, 2 Ves. 150.
(*h*) *Jones* v. *Harris*, 9 Ves. 486.
(*i*) *Murray* v. *Barlee*, 3 M. & K. 209.

ham, C., decided (*k*) that the general engagements of a married woman would be enforced by a Court of equity against a married woman's separate estate, not as executions of a power of appointment, but on the principle that to whatever extent she had, by the terms of the settlement, the power of dealing with her separate property, she had also the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and thus, where a married woman whose real estate was settled on her marriage to such uses as she should, by any deed or instrument in writing attested by one witness, or by her will, appoint, and in default of appointment upon trusts for her sole and separate use for life, with remainder over, made her will in pursuance of the power, and thereby charged her real estate with payment of her debts, the Lord Chancellor held that this was a good charge on her real estate of all her written engagements, and of all her debts generally, whether evidenced by writing or not.

In the case of *Johnson* v. *Gallagher* (*l*), decided by the Court of Appeal in 1861, a married woman living apart from her husband, and having separate estate, carried on trade. After the death of her husband the tradesmen who had supplied her with goods in her trade filed a bill against her and her trustees for an account of her separate estate, and payment out of it of their demands for the price of the goods; and it was held by Lord Justice Turner, but without the concurrence of Lord Justice Knight Bruce, that the separate estates of married women were bound by their debts, obligations, and engagements contracted with reference to and upon the faith or credit of those estates; that whether they were so contracted was to be judged of by all the circumstances of the case; and that when a married woman having separate estate, and living apart from her husband, contracted debts, the Court would impute to her the intention of dealing with her separate estate. Lord Romilly commented on and refused to follow this

(*k*) *Owens* v. *Dickenson*, 1 Cr. & Phil. 48.

(*l*) 3 De G., F. & J. 494.

decision in 1866, in the case of *Shattock* v. *Shattock* (*m*), but it was approvod of by the Court of Appeal in 1869 in the case of *Picard* v. *Hine* (*n*), and in the case of *The London Chartered Bank of Australia* v. *Lamprière* (*o*), the dictum of Lord Justice Turner as to the liability of the separate estate was approved and adopted, and the decision of Lord Romilly in *Shattock* v. *Shattock* was dissented from by the Judicial Committee of the Privy Council. Lord Justice James, who delivered the judgment in this case, said (*p*) :—"The term 'general engagements' is an ambiguous and misleading one. If it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate—*e. g.*, for buying or selling, or letting, or hiring a house—do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense, and to that extent, the proposition that her separate estate is not liable to her general engagements, is quite accurate. But that does not affect the rule, as laid down by Lord Justice Turner, as to general engagements, as to which it appears that they were made with reference to, and upon the faith or credit of, the separate estate."

Such, then, was shortly the history of the rise and development of the doctrine of separate use as administered by the Court of Chancery. It was a creation exclusively of the Court of Chancery, and was unknown to the Courts of common law. The Statute Law first took notice of it in the year 1857. Under the Divorce Act of that year (*q*) wives who had been deserted by their husbands (*r*), or who had obtained a judicial separation (*s*), were declared to be entitled to their earnings and property acquired since the desertion or separation, as their separate property. By the Married Women's Property Act of 1870 (*t*), the earnings of a married woman (*u*), person-

(*m*) L. R., 2 Eq. C. 182.
(*n*) L. R., 5 C. A. 274.
(*o*) L. R., 4 P. C. 572.
(*p*) page 593.
(*q*) 20 & 21 Vict. c. 85.
(*r*) Sect. 21.
(*s*) Sects. 25 and 26.
(*t*) 33 & 34 Vict. c. 93.
(*u*) Sect. 1.

alty to which she became entitled as next of kin of an intestate (*x*), sums not exceeding 200*l.* to which she became entitled under any deed or will (*y*), and rents and profits of realty to which she became entitled, as heiress of an intestate, were declared to be her separate property.

It was provided by the Judicature Act in 1873 (*z*) that where there was any conflict or variance between the rules of equity and the rules of common law the rules of equity were to prevail, thus bringing all the equitable doctrine of separate property, in addition to the statutory provisions, within the cognizance of the Courts of common law.

By the Married Women's Property Act of 1882 (*a*), it was provided, that every woman married after the Act came into operation should be entitled to hold and to dispose of as her separate property all real and personal property which should belong to her at the time of marriage, or should be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she might be engaged, or which she carried on separately from her husband, or by the exercise of any literary, artistic or scientific skill; and that every woman married before the Act came into operation (*b*) should be entitled to hold and dispose of, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, should accrue after the Act came into operation, including any wages, earnings, money and property so gained or acquired by her as aforesaid.

Before leaving this branch of the subject, it will be necessary to return to the liability of the wife's separate estate for her debts. As previously stated, her separate property was liable for her general engagements. By the Married Women's Property Act of 1870 (*c*), it was enacted, that a

(*x*) Sect. 7.
(*y*) *Ibid.*
(*z*) 36 & 37 Vict. c. 66, s. 25, sub-s. 11.
(*a*) 45 & 46 Vict. c. 75, s. 2.
(*b*) Sect. 5.
(*c*) 33 & 34 Vict. c. 93, s. 12.

husband should not, by reason of any marriage which should take place after the Act came into operation, be liable for the debts of his wife contracted before marriage, but that the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy, such debts as if she had continued unmarried.

The weak point in this provision was that a *feme sole*, who had contracted debts, might have married without a settlement; consequently, she would have had no separate estate against which the creditors could have come, and under the provisions of the Act the husband was not liable for his wife's ante-nuptial debts. In order to remedy this, it was provided four years afterwards, by the Married Women's Property Act Amendment Act, 1874 (*d*), that a husband should be liable for his wife's ante-nuptial debts up to the amount which he had received from his wife, or might with due diligence have received.

The husband's liability for his wife's ante-nuptial torts or breaches of contract was in no way affected by the provisions of the Act of 1870, but by the Amendment Act of 1874 (*e*) he was made liable only up to the amount which he had received, or might with due diligence have received, from his wife.

An interesting point arose in 1878, in the case of *The London and Provincial Bank* v. *Bogle* (*f*). A woman, previous to her marriage, executed certain promissory notes in favour of the plaintiffs. By an ante-nuptial settlement she settled her property upon herself for life without power of anticipation, with remainders over, and it was held by Sir James Bacon, V.-C., that, notwithstanding the restraint against anticipation, the plaintiffs were entitled to recover against the separate estate. This case only involved the question of an ante-nuptial debt, but in 1880, Sir Richard Malins, V.-C., in *Pike* v. *Fitzgibbon* (*g*), decided that the

(*d*) 37 & 38 Vict. c. 50, ss. 1 and 5.
(*e*) Sect. 2.
(*f*) 7 C. D. 773.
(*g*) 14 C. D. 837.

general engagements of a married woman entitled to separate estate were enforceable by a Court of equity against such separate estate as she had at the time when judgment was given, including (if her husband were then dead) estate limited to her separate use without power of anticipation. The case was, however, carried to the Court of Appeal, who held, in 1881 (*h*), that the general engagements of a married woman could be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation at the time when the engagements were entered into, as remained at the time when judgment was given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation. Lord Justice James remarked, "I desire to have it distinctly understood, as my opinion, and the opinion of my colleagues, and therefore as the decision of this Court, that in any future case the proper inquiry to be inserted is, what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of this Court. That is all that the Court can apply in payment of the debt. . . . . The only separate property which can be reached is the separate property, or the residue of the separate property, that a married woman had at the time of contracting the engagements which it is sought to enforce." And Lord Justice Cotton added, "The position of a married woman having separate property differs materially from that of a *feme sole*. Is it true that she is regarded in equity as a *feme sole?* She is regarded as a *feme sole* to a certain extent, but not as a *feme sole* absolutely, and there is the fallacy. She, in my opinion, is regarded as a *feme sole* only as regards property which, under the trust, she is entitled to deal with as if she were a *feme sole;* but as regards property which she is restrained from anticipating, she is not,

(*h*) 17 C. D. 454.

as regards persons other than her husband, in the position of a *feme sole*. As regards her husband, no doubt she is, as regards property settled to her separate use (whether there is a restraint upon anticipation or not), treated as a *feme sole*, that is to say, she, and not her husband, is the person who alone can receive and give a discharge for the money, and her husband is absolutely excluded; but, as regards the outside world, she is not regarded as a *feme sole* in respect of property subject to a restraint upon anticipation."

Although the decision of the Court of Appeal was strictly correct, still Sir Richard Malins' view was in accordance with the general idea of fairness; in fact, it may be said of the late Vice-Chancellor, that although his decisions were not always in strict accordance with technical rules, they were invariably fair, and always distinguished by a keen appreciation of the general idea of equity in its popular sense.

In consequence of this decision of the Court of Appeal an attempt was made to make the general engagements of a married woman binding on all her separate estate, a clause to this effect (*i*) being inserted in the Conveyancing and Law of Property Bill, 1881, but the clause was struck out in committee. But a similar provision was contained in the Married Women's Property Act of 1882 (*k*), it being enacted that every contract entered into by a married woman with respect to and to bind her separate property, should bind not only the separate property which she was possessed of or entitled to at the date of the contract, but also all separate property which she might thereafter acquire. Whether this provision of the Act is comprehensive enough or not time alone will prove.

If a married woman, who has entered into a contract during coverture, acquires property after her husband's death, or acquires property as a widow, the question may arise, is such property liable for the contract, first, while she remains a widow; second, if she marries again? Now, with regard to

(*i*) Clause 46.

(*k*) 45 & 46 Vict. c. 75. s. 1, sub-s. 4.

the first point, if the husband had lived the property would undoubtedly have been liable, and there seems no reason why the death of the husband should take away the liability; in the second case, the property being acquired by the woman before the second marriage would on that marriage become separate property, and would, therefore, appear to be liable to the contract.

In the case of *King* v. *Lucas* (*l*), by a post-nuptial settlement made in pursuance of ante-nuptial articles, certain policies of insurance on the life of the husband were assigned to trustees upon trust to receive the money and pay the income to the wife during her life for her separate use, independently of any future husband whom she might marry. There was no restraint on anticipation. During the life of her first husband the wife made promissory notes in favour of the plaintiff, and the plaintiff—the first husband being still alive—brought an action claiming a charge on the policies. And it was held by the Court of Appeal, in 1883 (reversing the decision of Justice Kay), that the trust for separate use did not arise till after the death of the husband, and that as by the decision in *Pike* v. *Fitzgibbon* the contracts of a married woman could only be enforced against property which formed part of her separate estate at the date of the contract, the action could not be maintained.

In 1878, the question arose as to whether in an action to charge wages and earnings of a married woman, which, by the Married Women's Property Act, 1870 (*m*), were her separate property, it would be necessary that her husband should be joined as a defendant (*n*). Sir Nathaniel Lindley decided that the husband must be joined, and remarked, "Before the Married Women's Property Act, 1870, it was well settled in Chancery as an inflexible rule, to which there were only special exceptions, such as in a case where a husband might be beyond the jurisdiction, that a suit could not be instituted by or against a married woman without the husband being a party. . . . . Now, the first question here

(*l*) 23 C. D. 712.
(*m*) Sect. 1.
(*n*) *Hancocks* v. *Lablache*, 3 C. P. D. 197.

is, whether, on the true construction of the Married Women's Property Act, 1870, such property as is therein declared to belong to her for her separate use, is property in respect of which she can sue and be sued as if unmarried? That it is such as she can sue for is undoubtedly declared in sect. 11, but save in certain excepted cases the Act does not expressly render her liable to be sued; and sects. 1 and 11 cannot be construed to mean that the property in sect. 1 declared to belong to her apart from her husband will, by virtue of sect. 11, belong to her in all respects as if she were an unmarried woman. I do not think it mere accident that a different set of phrases was used in sect. 1 and sect. 11. . . . So I find that the Act has not altered the law as to the proper mode of suing a married woman in respect of that property which by this Act is made her separate estate. Is there anything in the Judicature Act affecting this question? I think there is nothing which alters the whole law on this point, but it is declared that where there is no provision on the subject in the Act, the old practice shall be followed."

This was altered by the Married Women's Property Act, 1882 (*o*), which enacted that a married woman should be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole;* and that her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and that any damages or costs recovered by her in any such action or proceeding should be payable out of her separate property, and not otherwise. The Act also provided, that every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown (*p*), so that for the future the presumption will be in favour of the separate property being bound by the contract.

(*o*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2. (*p*) Sect. 1, sub-s. 2.

CHAPTER XII.

CONTRACTS.

UNTIL recent years, a married woman who had no separate estate was, as a rule, unable to contract, and if she entered into a contract it was altogether void, and no action would lie against her husband or herself for breach of it (*a*). The power of the wife to bind her husband by her contracts depends to a great extent on the principles of agency, and although the subject is interesting, it does not come within the scope of this essay.

There are various exceptions to the above-mentioned rule, some of which have been made by judicial decisions and some by recent legislation.

The oldest exception of all—one that existed previous to the Norman Conquest—was in the case of a contract made by the wife of the King of England. The king's wife was considered as a person distinct from the king, in the case of contract, and could sue and be sued without the king being joined, "For," says Lord Coke (*b*), "the wisdome of the common law would not have the king (whose continual care and study is for the publike, *et circa ardua regni*) to be troubled and disquieted for such private and petty causes."

Another exception occurred in the case of the custom of the City of London, by which, if a *feme covert*, the wife of a freeman, traded by herself in a trade with which her husband did not intermeddle, she might sue and be sued as a *feme sole*, and the husband was only named for conformity; and if judgment was given against the husband and wife, the wife only was taken in execution (*c*). The custom, however,

(*a*) *Fairhurst* v. *Liverpool Adelphi Loan Association*, 9 Ex. 422, 429.

(*b*) Co. Litt. 133 a.

(*c*) Bac. Abr. Customs of London, D.

only applied to the city courts, and in 1791 (*d*) the Court of King's Bench refused to regard it. These are the oldest of the exceptions, but there are others that have been built up by a series of decisions.

In the earliest of these it was decided, that the wife could sue or be sued without her husband when they were permanently separated, although the marriage still existed. The following are some of the principal cases in which this was decided. In 1291, where Thomas de Weyland had been abjured the realm for felony, Margerie de Mose, his wife, and Richard his son, exhibited their petition of right unto the parliament for the Manor of Sobbir, wherein her husband had an estate for life jointly with her, the inheritance being in Richard the son (*e*).

In the reign of Henry the Fourth, the wife of Sir Robert Belknap, one of the justices of the Court of Common Pleas, who was banished beyond the sea, commenced a suit in her own name, without her husband, he being still alive (*f*). In 1336, Edward the Third brought a *quare impedit* against the Lady of Maltravers, and she pleaded that she was covert of Baron, to which it was replied on the part of the king, that Lord Maltravers was in exile for a certain cause, and she was ruled to answer (*g*). In 1399, Henry the Fourth brought a writ of ward against Sibel B., who pleaded that she was covert of Baron, &c., and it was replied for the king, that her husband for a crime that he had committed against the king and the peers was exiled until he obtained the king's grace; and Chief Justice Gascoigne, *ex assensu sociorum*, awarded that she should answer (*h*).

In 1696, the principle was extended to a case where the separation was not permanent (*i*). The plaintiff brought an action against the Duchess of Mazarine for wages and money lent; the defendant pleaded coverture, and issue was joined.

(*d*) *Caudell* v. *Shaw*, 4 T. R. 361.

(*e*) 1 Par. Rec. 66.

(*f*) 2 Hen. 4, 7.

(*g*) 10 Edw. 3, 53.

(*h*) 1 Hen. 4, 1.

(*i*) *Derry* v. *Mazarine*, 1 Ld. Raym. 147.

Notwithstanding that there was very strong evidence that the Duke of Mazarine was alive in France, the jury found for the plaintiff, because the Duchess had lived in England for twenty years as a *feme sole*, and had contracted continually as such, and her husband was an alien enemy. It was moved on behalf of the Duchess, that the verdict was against evidence and law, for a *feme covert* could not be solely charged for debts and contracts without divorce and alimony, although the husband were a foreigner. But Chief Justice Holt held, that the husband being an alien enemy, and under an absolute disability to come and live in England, the law would make the wife of such a husband chargeable as a *feme sole* for her debts and contracts. For the case did not differ from the case of Lady Weyland and Lady Belknap, who were held able to sue and be sued, upon the abjuration or banishment of their husbands, as if they had been sole.

In all these decisions the separation had been involuntary, but in 1785, in the case of *Corbett* v. *Pœlitz* (*k*), the same law was held applicable by the Court of King's Bench where the husband and wife had separated by mutual agreement. This decision was really more what might have been expected from a Court of equity than from a Court of common law. Lord Mansfield, C. J., speaking of the legal position of a married woman said, "Her contracts are entirely and universally void; for her contracts, even for necessaries, are the contracts of her husband: she cannot be sued or taken in execution. This is the general rule. But then it has been properly said, that as the times alter, new customs and new manners arise: these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule."

The point arose again, before the Court of King's Bench, in 1800, in the case of *Marshall* v. *Rutter* (*l*), and it was then decided, that a *feme covert* could not contract and be sued as a *feme sole*, even though she were living apart from her husband, and had a separate maintenance secured to her by

(*k*) 1 T. R. 5. (*l*) 8 T. R. 554.

deed; Lord Kenyon, C. J., who delivered the judgment of the Court, said, "We find no authority in the books to show that a man and his wife can by agreement between themselves change their legal capacities and characteristics; or that a woman may be sued as a *feme sole* while the relation of marriage subsists, and she and her husband are living in this kingdom."

In 1831, it was decided by Sir Nicholas Tindal, C. J., Sir James Park, Sir Stephen Gaselee, and Sir John Bosanquet, that the wife of a convict, sentenced to transportation, was liable to be made a bankrupt, if she became a trader, although her husband remained in this country (*m*).

In 1857, it was provided by the Divorce and Matrimonial Causes Act (*n*), that in the case of a judicial separation, a wife was to be considered as a *feme sole* for the purposes of contract, and suing and being sued; and in the following year the provisions were extended to the cases where a woman had obtained a protection order (*o*).

By the Married Women's Property Act of 1870 (*p*), a married woman was enabled to bring an action in her own name for the recovery of wages, earnings, money and property, by the Act declared to belong to her for her separate use. By the 10th section of the same Act, it was provided that a married woman might effect a policy of assurance upon her own life or upon the life of her husband for her separate use, and that the same and all the benefit thereof, if expressed on the face of it to be so effected, should enure accordingly, and that the contract in such policy should be as valid as if made with an unmarried woman.

In 1879, Sir George Jessel, M. R., held, that a married woman could enter into a contract with her husband to live separately from him (*q*); and Sir Edward Kay, J., in 1881, decided that a married woman was able to make a binding

(*m*) *Ex parte Franks*, 7 Bing. 762.

(*n*) 20 & 21 Vict. c. 85, ss. 25 & 26.

(*o*) 21 & 22 Vict. c. 108, ss. 6—10.

(*p*) 33 & 34 Vict. c. 93, ss. 1 & 11.

(*q*) *Besant* v. *Wood*, 12 C. D. 605.

agreement for the compromise of a divorce suit (*r*); and by the Conveyancing Act of 1881 (*s*) she was enabled to appoint an attorney.

By the Married Women's Property Act of 1882 (*t*), it was provided that a married woman should be capable of entering into, and rendering herself liable in respect of, and to the extent of her separate property on, any contract, and of suing and being sued, either in contract, or in tort, or otherwise, in all respects as if she were a *feme sole;* and that her husband need not be joined with her as plaintiff or defendant, nor be made a party to any action or other legal proceeding brought by or taken against her.

Sir George Jessel, M. R., in commenting upon the Married Women's Property Act of 1870, in the case of *Howard* v. *The Bank of England* (*u*), said, "It does appear to me, that the present Act gives no power to contract to a married woman which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power to contract in respect of that property, which every married woman previously possessed in a Court of equity, and it superadds to that certain remedies in a Court of law which it is considered desirable to give to the married woman in respect of these small sums, but beyond that, I think the Act makes no alteration in the position of the married woman." However, these remarks will not apply to the Act of 1882; for under the before-mentioned provisions of this Act, the capacity of a married woman to contract would not appear to depend upon her having separate property at all, although her liability is limited by the amount of her separate property.

(*r*) *Hart* v. *Hart*, 18 C. D. 670.
(*s*) 44 & 45 Vict. c. 41, s. 40.
(*t*) 45 & 46 Vict. c. 75, s. 1 (2).
(*u*) 19 Eq. 301.

CHAPTER XIII.

EQUITY TO A SETTLEMENT.

THE doctrine of equity to a settlement had its origin in the maxim that "He who seeks equity, must do equity." Whenever a husband had to seek the aid of the Court of equity in order to reduce his wife's property into possession, the Court refused to lend him its aid, unless he made some provision out of the property for his wife, that is, if the wife required it.

The doctrine has existed from very early times: in 1733, Lord King, C., said, in the case of *Brown* v. *Elton* (*a*), "I found it to be the practice at my coming into this Court, to enforce the husband, before he recovers by the aid of equity his wife's portion, to make a settlement." And in 1839, in the case of *Sturgis* v. *Champneys* (*b*), Lord Cottenham, C., remarked, "Upon a careful examination of the authorities, I do not find the time at which the Court did not exercise this jurisdiction in favour of the wife." It is difficult to fix the exact period at which the doctrine originated, but it is obvious that it was subsequent to the institution of the doctrine of separate use.

In 1638, a husband sued in the Ecclesiastical Court for a portion due to his wife, but upon an application to the Court of Chancery an injunction was ordered to stay proceedings in the Ecclesiastical Court until the husband should make a competent jointure (*c*).

In a case decided in 1718 (*d*), where a widow brought an action against the assignees of her deceased husband to recover the benefit of a mortgage, the Court refused to order a

(*a*) 3 P. Wms. 205.
(*b*) 5 M. & C. 103.
(*c*) *Tanfield* v. *Davenport*, Tothill, 179.
(*d*) *Bosvil* v. *Brander*, 1 P. Wms. 458.

settlement, because the widow was the plaintiff against the assignees, and so she, and not the creditors, were seeking the aid of equity. In accordance with this decision it was the general opinion, until the year 1800, that a settlement would not be ordered when the wife, as plaintiff, sought the aid of equity; but in that year, in the case of *Elibank* v. *Montolieu* (*e*), upon the bill of a married woman entitled to a share of the personal estate as one of the next-of-kin of an intestate, against her husband and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was held by Lord Rosslyn, C., that he was not entitled to retain; but that the plaintiff's share was subject to a further provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; since which time the law has been settled.

There was no strict rule as to the amount that would be settled, the proportion varying according to the circumstances of each case.

In 1742, Lord Hardwicke, C., ordered one-half of the fund in question to be settled on the wife and children (*f*); and in 1823, Sir John Leach, V.-C., referred the question of the amount to the master, regard being had to the extent of the wife's fortune, and to any settlement which might have been previously made upon her (*g*). In 1839, a husband having, without sufficient cause, separated from his wife, leaving her unprovided for, Sir Lancelot Shadwell, V.-C., ordered three-fourths of a fund in Court arising from property bequeathed to the wife, to be settled on her and her issue generally (*h*). In 1816, in the case of *Beresford* v. *Hobson* (*i*), Sir Thomas Plumer, V.-C., intimated that the Courts would not settle the whole of the property on the wife and children, and this statement was referred to in the argument of *Brett* v. *Greenwell* (*k*), in 1838, where the husband had taken the benefit of

(*e*) 5 Ves. 737.

(*f*) *Jewson* v. *Moulson*, 2 Atk. 423.

(*g*) *Green* v. *Otte*, 1 Sim. & St. 250.

(*h*) *Coster* v. *Coster*, 9 Sim. 597.

(*i*) 1 Mad. 362.

(*k*) 3 You. & Col. 230.

the Insolvent Act. In giving judgment in this case, Baron Alderson said, "In a case of this nature, the situation of an insolvent is very different from that of a bankrupt. The wife of an insolvent may be in a workhouse with her children, and yet, if the insolvent afterwards acquires property, neither the wife nor the children will be benefited by it, but the whole goes to the creditors. A bankrupt, on the other hand, after he has obtained his certificate, is a free man. It appears to me, therefore, that this insolvent's wife and her children are entitled to the whole fund; and if I am bound, by the practice of the Court, to take away from her any portion of it, I will take away a shilling." In the case of *Gardner* v. *Marshall* (*l*), a husband had large advances made to him by his wife's father, and had the benefit of a provision made for his wife by her father's will, and afterwards became bankrupt, and it was held by Sir Lancelot Shadwell, V.-C., in 1845, that the wife, who had no provision except the income of a fund under her uncle's will, was entitled to have the whole of that income settled on her for life without power of anticipation. The Vice-Chancellor said, "The Master finds that, having regard to the large amount of property that John Gardner has received from the estates of his wife's relations, to her entirely unprovided condition, and to her former circumstances and position in life, the whole of the interest ought to be settled on her for her separate use for life; and I am of the same opinion. The circumstances of the case fully justify the conclusion to which the Master has come; and, if there is no precedent for doing what he has suggested, I will make one."

The general rule of the Court in late years has been to settle the whole of the fund on the wife when the husband has not provided for her, and has become insolvent. In 1851, Lord Truro, C., decreed the whole to the wife as against an assignee of the husband for value (*m*). In 1852, where the wife had been abandoned and deserted by her husband, who had since been living in adultery and had made no provision

(*l*) 14 Sim. 575. (*m*) *Scott* v. *Spashett*, 3 Mac. & Gor. 599.

for her, Lord St. Leonards, C., decreed the whole to her (*n*); and in 1853, Sir Richard Kindersley, V.-C., decreed the whole to the wife where the fund was only 153*l.*, and the husband was a bankrupt and unable to maintain her (*o*).

In 1820, the question had to be decided, whether a married woman could claim a settlement out of an equitable life interest (*p*). A legacy having been given to a married woman of the dividends of a sum of 3*l.* per Cent. Bank Annuities for her life, with a bequest over, she and her husband joined in a sale of her life interest, and subsequently the husband became a bankrupt. On a bill being filed by the wife against the purchaser, insisting on a settlement, it was held by Sir John Leach, V.-C., that, though the Court could have compelled a provision by the husband on his bankruptcy, a purchaser was not compellable to make such a provision. The Vice-Chancellor, after remarking that the point was new and very important, postponed his decision in order to look carefully into the authorities. Subsequently, when delivering his judgment, he said, "I find no authority for the equity claimed by the wife as against the particular assignee, in the case of an interest given to the wife for her life; and it does not follow as a corollary or consequence from any established doctrine of the Court. Where an absolute equitable interest is given to the wife, the Court will not permit the husband to possess it, without making a provision for the wife, or without her express consent; and all who claim under the husband must take his interest subject to the same equity. But where an equitable interest is given to the wife, for her life only, this Court does not permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true, that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this Court will apply any equitable interest which he retains for the life

(*n*) *Dunkley* v. *Dunkley*, 2 De G., M. & G. 390.

(*o*) *Re Kincaid's Trusts*, 1 Drew. 326.

(*p*) *Elliott* v. *Cordell*, 5 Mad. 149.

of the wife, either wholly or in part, for the maintenance of the wife; and if the husband becomes bankrupt or takes the benefit of an Insolvent Debtors Act, this Court will fasten the same obligation of maintaining the wife out of the property of this description, which devolves, by act of law, upon the general assignee; for when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife; but the same principle does not necessarily apply to a particular assignee for a valuable consideration, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it. If, however, I consider it to be useful that the same rule should be applied to the particular assignee as to the general assignee, which may be doubted, by declaring this rule, in the absence of all direct authority, and of all authority leading necessarily to the same conclusion, I fear that I should not be administering the actual law of this Court, but I should be making a new law, and I cannot venture to assume such a jurisdiction."

This distinction made by Sir John Leach between a general and a particular assignee was followed by Lord Brougham, C., in 1831, in the case of *Stanton* v. *Hall* (*q*), where he held that an annuity had passed by the husband's assignment to a purchaser for value, and that the wife had no equity for a settlement out of the annuity. It would almost appear from the remarks made in his judgment that the Lord Chancellor was sorry that the equity to a settlement had ever been allowed out of capital as against a *bonâ fide* purchaser for value.

Since the decision of Sir Lancelot Shadwell in the case of *Vaughan* v. *Buck* (*r*) in 1843, it has been settled that the wife is not entitled to a settlement out of a life interest, so long as the husband is maintaining her as best he can. In 1852, in the case of *Tidd* v. *Lister* (*s*), Sir George Turner, V.-C.,

(*q*) 2 Russ. & Myl. 175.
(*r*) 13 Sim. 404.
(*s*) 10 Hare, 140.

refused to order a settlement on a wife out of a life interest, although the husband was not maintaining her; the ground for the Vice-Chancellor's decision being, that previous to ceasing to maintain the wife, the husband had assigned the life interest to a *bonâ fide* purchaser for value. The wife appealed, but the Vice-Chancellor's decision was upheld by Lord Cranworth, C., in 1853 (*t*).

In 1861, the question arose as to whether the wife's equity would attach as against a *bonâ fide* purchaser for value, the property out of which she claimed her equity being a reversionary life interest; in deciding the point, Lord Justice Turner said (*u*), "That a married woman is not in an ordinary case entitled as against a particular assignee of her husband for valuable consideration to a provision to her maintenance out of income to which the husband is entitled in her right, where the assignment has been made whilst the husband was maintaining her, although he may afterwards have become unable to maintain her, has now been so long settled that it cannot, in this Court at least, be disturbed; but it was attempted to distinguish this case upon the ground that the interest of the wife was reversionary at the time when the assignment was made. The cases seem to me to establish that the husband, whilst he maintains the wife, has full power to deal with the income which he is entitled to receive in her right, and I do not think there is any sound distinction between the income which he is, and the income which he may become, entitled to receive. It would be difficult to say he can deal with income accruing and to accrue, and yet cannot deal with income which may afterwards come into possession. He has as much power to assign the future as the present income, and all the inconveniences which would result from attaching the equity of the wife would follow in the one case, as much as in the other."

Where the husband was a bankrupt or insolvent, he was considered by the mere fact of bankruptcy or insolvency as

(*t*) 3 De G., M. & G. 857.

(*u*) *Life Association of Scotland* v. *Siddal*, 3 De G., F. & J. 276.

incapable of maintaining his wife; thus, the assignee of an insolvent debtor whose wife was entitled for life to real property was bound, on seeking the aid of the Court of Chancery, to make a provision for the wife (*x*).

An interesting case was decided in Ireland in 1880 (*y*), Vice-Chancellor Chatterton holding that a husband, though living apart from his wife, but not divorced or judicially separated, and not contributing to her support, could, by releasing a legacy bequeathed to her during the coverture, and payable *in præsenti*, extinguish her equity to a settlement thereout. The ground for the Vice-Chancellor's decision was, that the effect of a release was to extinguish the legacy completely, and consequently there was nothing out of which a settlement could be ordered; whereas the effect of an assignment was merely to change the possession, and not to do away with the subject out of which the settlement was claimed. This decision of the Vice-Chancellor was affirmed on appeal (*z*).

It was provided, in 1857, by Sir Richard Malins' Act (*a*), that a married woman might release her equity to a settlement under the formalities therein mentioned.

Although, whenever a settlement was made by the Court provisions were made for the children of the wife, still the children themselves had no equity to a settlement (*b*); consequently, if the wife died without having proceeded far enough to obtain her settlement, the children could do nothing, as they were only regarded on account of their mother's equity. It therefore became important to determine what steps by the wife were necessary in order to secure a settlement. In the case of *De La Garde* v. *Lempriere* (*c*), in 1843, Lord Langdale, M.R., held that the wife's equity to a settlement did not attach upon filing a bill; and if, therefore, the wife died without making any claim to a settlement, her children after her death had no right to one. "I conceive it to be

(*x*) *Sturgis* v. *Champneys*, 5 Myl. & Cr. 97.

(*y*) *M'Creery* v. *Searight*, L. R. (Ir.), 5 Ch. 206.

(*z*) L. R. (Ir.), 5 Ch. 641.

(*a*) 20 & 21 Vict. c. 57.

(*b*) *Murray* v. *Elibank*, 10 Ves. 84.

(*c*) 6 Beav. 344.

settled," said the Master of the Rolls, "that if there be a decree for a settlement on the wife, the children are entitled to the benefit of it, although the wife may have died before any proposal for a settlement was carried into the Master's office. In this case, the wife filed no bill claiming a settlement, and she died before any order for a settlement was made. In *Scriven* v. *Tapley* (*d*), the child after the death of her mother filed her bill for a settlement. It was decreed to her by Sir Thomas Clarke at the Rolls, but as to that part the decree was reversed by Lord Northington. And in the case of *Lloyd* v. *Williams* (*e*), Sir Thomas Plumer, after a careful examination of all the authorities, said, that no case had trenched upon *Scriven* v. *Tapley*, and the conclusion to which he came was, 'that the right of the child can arise only out of contract or under a decree.' This case would, therefore, be very clear if it were not for the case of *Steinmetz* v. *Holthin* (*f*), which was decided by Sir John Leach when he was Vice-Chancellor; who, after admitting that the equity was personal to the wife, and that the Court acknowledged no original right in the children, and that the children could claim only such provision as the wife thought fit to secure for herself, nevertheless was of opinion, that when a suit was instituted for the administration, out of which the legacy was to be paid, and the wife was a party defendant to such suit, the equity of the wife attached upon the property on the filing of the bill, and that the equity having attached upon the property, and the wife having died without waiving it, the children became entitled to the benefit of it. If this case had been followed by others, I should have considered myself bound by it; but standing alone, and being, as it appears to me, contrary to the previously-existing rules on this subject, I do not consider myself to be at liberty to act upon it, without considering the principle on which it is founded. In all cases, the equity of the wife is personal, and it arises upon the vesting of the legacy in her; it may be defeated by a

(*d*) Amb. 509.
(*e*) 1 Mad. 464.
(*f*) 1 Glyn & J. 64.

voluntary payment of the executors to her husband, who has a legal right to receive it, and give a discharge for it. If the payment is to be made through the medium of the Court, her equity will be enforced if she desires it, but not otherwise; she may abandon it, in which case her children can claim nothing, and if she claims it for herself, the Court requires the benefit to be extended to her children; her equity and the equity of the children are treated as one equity, to be enforced or not at her option. If the equity were to be considered as attached to the property on the filing of the bill, it must, I apprehend, be considered for the benefit of her children at the same time, but if so, she could not afterwards waive it for herself, because her equity and theirs are one; and as it is admitted that she can waive it after the institution of the suit, it seems to me to follow that it is not an equity which, upon the filing of the bill, attaches upon property for the benefit of the children. It is true, that after the filing of the bill the discretion which the trustee or executor had to pay the wife's legacy to the husband is greatly altered. The filing of the bill has, it has been said, made the Court the trustee, and if the wife be living, the Court will not pay the wife's legacy to the husband if she desires a settlement, or unless she waives it; but when death has made any option on her part impossible, when nothing has occurred from which it can be concluded that she has made an option, there seems to be no reason why the legal right of the husband should not prevail, and I am therefore of opinion, notwithstanding the case of *Steinmetz* v. *Holthin*, that in this case the wife's equity did not attach to the property for the benefit of the children on the institution of the suit, or before her death, but that upon her death before decree, and before any arrangement for a settlement, her legal personal representative became entitled to the legacy."

But where a decree had been obtained directing a settlement on a woman and her children, and before the report the married woman died, without having done anything to waive her equity, Sir William Grant, M. R., held, that the

children had a right to provision out of the property of their mother "upon their supplemental bill" (*g*).

In the case of *Lloyd* v. *Mason* (*h*), decided by Sir James Wigram, V.-C., in 1845, a married woman entitled to a legacy appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel; and the counsel determined that she was entitled to a settlement of the moiety, subject to the costs. Before any further steps were taken, the wife died, leaving children. The Vice-Chancellor held that the husband and those claiming under him were, by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled.

In decreeing a settlement, the Courts of equity regarded the interests of the children, and this although no claim had been made on their behalf, and even where the decree made no mention of the provision for the children the Court did not allow this to prejudice the children's interest. Thus, by the decree made at the hearing of the case of *Grove* v. *Clarke* (*i*), it was referred to the Master to approve of a settlement to be made on a married woman, and for that purpose any of the parties were to be at liberty to lay proposals before the Master. No question was raised at the hearing as to the children, and before any proposals were made to the Master the married woman died, and it was held by Lord Langdale, M. R., in 1836, on a supplemental bill filed by the husband against the surviving child of the marriage and her husband, that the decree enured for the benefit of the children.

In the case of *Eedes* v. *Eedes* (*k*), decided by Sir Lancelot

(*g*) *Murray* v. *Elibank*, 13 Ves. 1.
(*h*) 5 Hare, 149.
(*i*) 1 Keen, 132.
(*k*) 11 Sim. 569.

Shadwell in 1841, the wife had left her husband in consequence of ill-treatment and was still living separate from him. He did not contribute towards her support, and there was nothing to show that the wife had been unchaste. The question was, whether the wife was entitled to a settlement, notwithstanding that she was living separate from her husband. The Vice-Chancellor said, "I do not sit here to decide on the merits or demerits of the husband; but, having heard no reason why there should not be a decree, I think it ought to be referred to the Master, to approve of a proper settlement of the plaintiff's property."

If, however, the wife had been guilty of adultery the Court would not direct a settlement to be made on her (*l*); but in a case decided by Lord Langdale in 1850 (*m*), where both the husband and wife were living in adultery, the Master of the Rolls directed a settlement on the wife.

Different opinions have existed on the question whether Sir Edward Turner's case (*n*) involved the doctrine of equity to a settlement or not. Mr. Macqueen is of opinion that the case had nothing to do with the equity to a settlement, but that it was a decision on the subject of separate use; this matter has been mentioned previously when treating of a married woman's separate property. There can be no doubt that Sir Edward Turner's case has always been regarded as a decision on the subject of equity to a settlement. Thus, Sir James Wigram, V.-C., in 1844, in *Hanson* v. *Keating* (*o*), which was a case on equity to a settlement, said, "The question is, what are the equitable rights of the parties, independently of their relative positions on the record. Sir Edward Turner's case, if it be law, answers this question. . . . . I believe the understanding of the profession prior to the decision in *Sturgis* v. *Champneys* to have been, that Sir Edward Turner's case was in accordance with the principles of the Court, and I advert to that understanding the more,

(*l*) *Carr* v. *Eastabrooke*, 4 Ves. 146.
(*m*) *Greedy* v. *Lavender*, 13 Beav. 62.
(*n*) 1 Vern. 7.
(*o*) 4 Hare, 7.

not only because the Vice-Chancellor of England concurs in it, but because I know the learned editor of Mr. Roper's book on the Law of Husband and Wife always lamented the decision in *Sturgis* v. *Champneys* as having, in his opinion, unsettled the law."

The general opinion was, that Sir Edward Turner's case decided that a wife could claim no equity to a settlement out of a term in realty. Mr. Macqueen remarks (*p*), "Sir Edward Turner's case did not decide what it is supposed to have decided; but what it really did decide is no longer law." But this remark, that "what it did decide is no longer law," applies equally even although it did involve the question of equity to a settlement out of a term in realty, the point having been decided by Lord Cottenham, C., in 1839, in the case of *Sturgis* v. *Champneys* (*q*). In this case the assignee of an insolvent debtor, whose wife was entitled for life to real property, was obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being vested in mortgagees, and the Lord Chancellor, in an elaborate judgment, in which he reviewed the previous cases on the subject of equity to a settlement, held, that the assignee was bound to make a provision for the wife. But notwithstanding this decision, the point was again raised in 1844 in the before-mentioned case of *Hanson* v. *Keating* (*r*). Here a husband and wife assigned by way of mortgage the equitable interest of the husband in right of his wife in a term of years. The mortgagee filed his bill against the husband and wife and the trustee of the legal estate, for a foreclosure and assignment of the term; but Sir James Wigram held, upon the authority of *Sturgis* v. *Champneys*, that the wife was entitled to a provision for her life, by way of settlement, out of the mortgaged premises.

It was provided by statute in 1847 (*s*), that trust funds might be paid into Court without a suit, and by the Chancery

(*p*) Husb. & Wife, 2nd ed. p. 96.

(*q*) 5 Myl. & Cra. 97.

(*r*) 4 Hare, 1.

(*s*) 10 & 11 Vict. c. 96.

Procedure Act of 1852 (*t*), proceedings in administration actions were considerably cheapened. In consequence of these statutes, the Courts of equity had increased opportunities of enforcing the doctrine of equity to a settlement. On the other hand, the importance of the doctrine has considerably decreased in late years; the Married Women's Property Act of 1870 (*u*) took away the husband's interest in such property of his wife as was therein mentioned, and consequently the wife's equity to a settlement out of such property no longer arose; and since the Married Women's Property Act of 1882 (*x*), the question of equity to a settlement can only arise in respect of property belonging to a married woman, whose marriage took place before the 1st of January, 1883, and whose title to which accrued before that date.

(*t*) 15 & 16 Vict. c. 87.
(*u*) 33 & 34 Vict. c. 93.
(*x*) 45 & 46 Vict. c. 75.

CHAPTER XIV.

TESTAMENT.

GLANVIL tells us that a married woman could make no will without her husband's consent, but that if she obtained his consent she could make a will of one-third part of his personalty; he says (*a*), "mulier sui juris, testamentum facere potest. Si vero fuerit in potestate viri constituta, nihil sine viri sui authoritate facere potest etiã in ultima voluntate, de rebus viri sui. Veruntamen pium esset et marito valde honestum si rationabilem divisam uxori suæ concessisset, scilicet usq; at tertiam partem rerum suarum quam viva quidem obtinuisset si maritum suum supervixisset ut plenius infra liquebit. Quod plerique mariti facere solent unde marito commendabiles efficiũtur."

In Bracton's time a married woman could under certain circumstances make a will, and by it bequeath part of her husband's property as well as her own. He says (*b*), "Si mulier fuerit sub potestate viri constituta, testamenti factionem non habebit absque viri sui voluntate, propter honestatem. Tamen receptum est quandoque quod testamentum facere possit de rationabili parte quam habitura esset si virum supervixisset, et maxime de rebus sibi datis et concessis ad ornamentum quæ sua propria dici poterunt, sicut de robis et jocalibus."

The licence for the wife to dispose of part of her husband's property would appear to be a remnant of the law of community of goods, which probably once existed in England.

The husband frequently allowed his wife to dispose of her own property, but up to 1426 these licences were only recognized by the Ecclesiastical Courts, but in that year the

(*a*) vii. 5. (*b*) Fo. 61.

Common Law Courts recognized their validity (*c*). However, in 1590, in the case of *Finch* v. *Finch* (*d*), the point arose, "si la feme esteant covert poit faire testament, et executors per l'assent le baron;" and it was held "per touts que el puissoit faire testament, et executors pur suer pur choses en accõn, et de possesser biens et chattels queux el mesme avoit come executrix: mes nemy de doner legacies."

The general assent of the husband was not sufficient to make the will good, it was necessary that the consent should be given to the identical will in question; and in 1740 it was held (*e*), that the husband ought to be examined at the time of probate as to his consent, and that until such examination it would not have the effect or operation of a will. The husband could therefore revoke his consent at any time during the coverture or before probate. If the husband died first, the will was void, as the requisite consent could not be obtained.

The husband's consent could be implied from circumstances, and if after her death he acted upon the will, or once agreed to it, he was not at liberty to retract his assent and oppose the probate (*f*).

The Norman law allowed no power of testamentary disposition to a married woman over lands, and it was only in places where the innovations of the Norman lawyers had been successfully resisted, that the power existed at all, and then, in order for the will to be good, the married woman had, as in the case of a will of personalty, to obtain the consent of her husband, for as the Natura Brevium says (*g*), "el ne poᵗ. fair testaᵗ. mez del assent son bār."

By the custom of the City of London, a wife could devise to her husband, or to a stranger with the assent of her husband (*h*); however, a custom for a wife to devise was said to be unreasonable (*i*).

(*c*) 4 Hen. 6, 31.

(*d*) Moore, 339.

(*e*) *Henley* v. *Philips*, 2 Atk. 49.

(*f*) Williams on Exors., 8th ed. p. 55.

(*g*) Edit. of 1525, fo. lxxxvii.

(*h*) Privilegia Londini, ed. of 1702, p. 156.

(*i*) 1 Sid. 17.

When uses were adopted as a method of evading the restrictions on the testamentary power of disposition of land, an effort was made to apply the method to the case of a married woman's will of realty. A woman, previous to her marriage, settled her lands to her own use, and after her marriage devised the use to her husband, and then died. But the Court of Chancery, in 1479, held that the will was void (*k*).

By the Statute of Wills of 1540 (*l*), owners of realty were empowered to dispose of nearly the whole of their real property by will, but by the Act "concerning the explanation of wills," which became law about two years afterwards, it was provided, that wills or testaments made of any manors, lands, tenements or other hereditaments, by any woman covert should not be taken to be good or effectual in the law (*m*), and this provision was not altered by the Wills Act of 1837, it being by that statute expressly provided (*n*), that no will made by any married woman should be valid, except such a will as might have been made by a married woman before the passing of the Act.

However, the chief exception to the general rule that a married woman was incapable of making a will, occurred in the case of separate estate; this point has been treated previously, and it will therefore be unnecessary to do more here than mention the fact.

Although, as previously stated, a married woman could not dispose of a use by will, yet the Courts always allowed her to execute a power by will. Thus, if property was settled to such uses as a married woman should by will appoint, a will made by her in exercise of such power was valid. In this case the Courts did not regard the married woman as conveying anything; the settlor was considered as the conveying party, and the married woman was regarded as the settlor's attorney, and as merely filling in the name of the person to whom the conveyance was to be made. This idea was strictly

(*k*) 18 Edw. 4, 11.
(*l*) 32 Hen. 8, c. 1.
(*m*) 34 & 35 Hen. 8, c. 5, s. 14.
(*n*) 7 Will. 4 & 1 Vict. c. 26, s. 8.

carried out, and if by exercising the power the married woman deprived herself or her husband of any interest in the lands which were the subject of the power, the appointment was considered void. Thus, in the case of *Antrim* v. *Buckingham* (*o*), decided in 1662, the Lady Margaret of Antrim, being a *feme sole* seised of a reversion after one life, conveyed the land to the use of herself for life, with remainder in tail, and with power for herself, being *sole*, to make leases for three lives or twenty-one years in possession. She married, and then she and her husband leased for twenty-one years in the life of the tenant for life, to commence from the date, for payment of debts, &c. And Chief Justice Bridgeman held that the power was not pursued, for by marrying, the woman had put herself under the power of her husband; and there was a difference between a nude power, and a power flowing from an interest; for when a bare power was given to a *feme* by will to sell lands, although she married, yet she might sell, and might sell to her husband; but when she reserved a power out of an interest of her own, *contra;* "but," added the Chief Justice, "such power ought to be expounded benignly at this day, though formerly taken strictly."

A similar point arose in *Blithe's Case* (*p*), decided by Sir John Churchill, M. R., in 1685. Here a widow, having one child, and being possessed of a term for years, previous to her second marriage assigned the lease to trustees in trust that she should receive the profits during her life, and afterwards in trust for her child for life, and afterwards upon such trusts as she should declare and appoint. She then married. The second husband enjoyed the lease during the life of his wife, and after her death the child received the profits during his life. The wife, during the coverture by the second husband, appointed that the trustees should, after the death of her child, permit the defendant to receive the profits during the residue of the term. The Master of the Rolls held, that the execution by the wife after marriage was void. Not but

(*o*) Freeman (Chan.), 168; 1 C. C. 17.

(*p*) Freeman (Chan.), 91.

that a *feme covert* might, in many cases, execute a naked power; but here the power was coupled with an interest, which interest, by the marriage, vested in the husband; for the residue of the term being not disposed of in the first settlement, was a trust for the wife, and, consequently, was by marriage a trust for the husband, which the wife could not dispose of without him.

"However," says Sir Edward Sugden, writing in 1845, "it has long been firmly settled, that a married woman may execute a power, whether appendant, in gross, or simply collateral, and as well over a copyhold as a freehold estate" (*q*).

A mere ante-nuptial contract relating to specific lands has been held sufficient to give a wife an equitable power to devise (*r*).

The law has always allowed a married woman, who is sole executrix, to make a will delegating her office, but nothing passes under the will except such assets of the testator as are outstanding at the death of the testatrix.

By the Divorce Acts of 1857 and 1858 (*s*), a married woman who had obtained a protection order, or a judicial separation, was enabled to make a will of any money or property which she might acquire by her own lawful industry, and property which she became possessed of after such desertion. A woman who had been deserted by her husband acquired some property by her own exertions, which she disposed of by will. She subsequently obtained an order from the magistrates protecting her earnings and property; and it was held by Lord Penzance, in 1871, that such order had a retrospective effect, extending back to the commencement of the desertion, and that the will was a valid instrument to pass the property acquired by her during such desertion (*t*).

In 1689 it was held (*u*) that a wife, whose husband was banished for life by Act of Parliament, might make a will, and

(*q*) Sug. on Powers, 7th ed. p. 181.

(*r*) *Wright* v. *Cadogan*, 2 Eden, 239.

(*s*) 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108.

(*t*) *Re Goods of Ann Elliott*, L. R., 2 P. & D. 274.

(*u*) *Portland* v. *Prodgers*, 2 Vern. 104.

in everything act as a *feme sole*, as if her husband were dead; and the same rule was applied where the husband was an alien enemy (*x*), and where he had been transported beyond the seas (*y*).

In 1831, in the case of *Ex parte Franks* (*z*), the Court of Common Pleas decided, that the wife of a convict sentenced to transportation was liable to be made a bankrupt, if she became a trader, although her husband remained in this country; and on the authority of this decision, Sir J. P. Wilde held, in 1865 (*a*), that the wife of a convicted felon was a *feme sole* as to her testamentary capacity, and that a will made by her whilst her husband was undergoing his sentence was therefore entitled to probate.

In the case of *Miller* v. *Bown* (*b*), a widow having after the death of her husband delivered a will made during coverture to her executor for safe custody, such delivery, coupled with other recognitions, was held by Sir John Nicholl, in 1828, to amount to a republication, rendering it a new will of which the executors were entitled to a general probate. But since the passing of the Wills Act (*c*) of 1837, no will made by a married woman, which would have been invalid on account of coverture, can be rendered valid by the fact that the woman outlived the coverture, unless after the coverture ceased the will be re-executed as an original will is required to be executed under the statute (*d*).

(*x*) *Deerley* v. *Mazarine*, Salk. 116.

(*y*) *Newsome* v. *Bowyer*, 3 P. Wms. 37.

(*z*) 7 Bing. 762.

(*a*) *Re Coward*, 34 L. J. (N. S.), P. & M. 120.

(*b*) 2 Hagg. Ecc. Rep. 209.

(*c*) 7 Will. 4 & 1 Vict. c. 26.

(*d*) *Willock* v. *Noble*, L. R., 7 H. L. 580.

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